Supreme Court
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No. _____

In The

Supreme Court of the United States

CARL W. CLEVELAND,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can alleged false statements or omissions in applications for state licenses be the basis for federal mail or wire fraud charges, on the theory that a license that has not yet been issued constitutes "property" of the State, of which the State is deprived when it issues the license?

2. Is materiality an element of the offense of mail fraud?

LIST OF PARTIES

Petitioner Carl W. Cleveland was a defendant in the District Court and an appellant in the Court of Appeals. Respondent, who was plaintiff in the District Court and appellee and cross-appellant in the Court of Appeals, is the United States. Also defendants in the District Court and appellants in the Court of Appeals were Fred H. Goodson, Maria F. Goodson, and Larry S. Bankston. In addition, Mr. Bankston and Ms. Goodson were cross-appellees. Intervenors in the forfeiture proceedings in the District Court and appellants in the Court of Appeals were Maria F. Goodson, Alexandros F. Goodson, and Truck Stop Gaming, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 21, 1999.

OPINIONS BELOW

The opinion of the District Court, holding that unissued video poker licenses are "property" under the federal mail fraud statute, is reported at 951 F. Supp. 1249 and is reproduced in the Appendix at A. 52a.[1] The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 182 F.3d 296 and is reproduced at A. 1a. The order of the Court of Appeals denying petitioner's petitions for rehearing and rehearing in banc is unreported and is reproduced at A. 45a. The order of the Court of Appeals denying petitioner's motion for leave to file a supplemental brief addressing *Neder v. United States*, 119 S. Ct. 1827 (1999), is unreported and is reproduced at A. 50a.

JURISDICTION

The judgment of the District Court was entered on October 20, 1997. The judgment of the Court of Appeals

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[1] "A." denotes the appendix to this Petition, "T." the trial transcript, "GX" a government exhibit, and "R." the record on appeal.

was entered on July 21, 1999. A. 1a. Petitioner's timely petition for rehearing was denied on September 2, 1999. A. 45a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, are set forth in the Appendix at A. 87a-88a.

STATEMENT

A. The License Applications.

In July 1991, the Louisiana legislature enacted a law allowing the operation of video poker machines at certain business establishments, including truck stops. *See* 1991 La. Sess. Law Serv. Act 1062 (West) (codified as amended at La. Rev. Stat. Ann. § 27:301 *et seq.*). At the time, Fred Goodson operated a truck stop in Slidell, Louisiana. T. 4066. In February 1992, Goodson arranged for the formation of a limited partnership, Truck Stop Gaming, Ltd. ("Truck Stop Gaming"), that would operate video poker machines at the Slidell truck stop and other truck stops. T. 806-07, 4141-42. As he had done with two other family businesses, T. 3532, 3535-36, Fred Goodson vested ownership in Truck Stop Gaming in his children, Alex and Maria, but retained control over the limited partnership's

operations.[2] At the time, Maria Goodson was 23 years old and a student at Tulane University. GX 5. Her brother Alex was 28 years old and managed a Hardee's fast food restaurant owned and operated by the Goodsons as a family business. *Id.*

Fred Goodson established Truck Stop Gaming with the help of a New Orleans law firm, Cleveland, Barrios, Kingsdorf & Casteix ("CBK&C"). Petitioner Carl Cleveland, a trial lawyer who had practiced law in New Orleans since 1966, had represented Fred Goodson in prior litigation matters. T. 4065-66. One of Cleveland's partners prepared the partnership agreement for Truck Stop Gaming, which was organized as a partnership *in commendam* (a form of limited partnership under Louisiana law). T. 4083-84; GX 2A. Maria and Alex Goodson signed the agreement, GX 2A, and it was duly filed with the Secretary of State as required by Louisiana law. T. 994-95, 3422. The start-up capital for the new partnership was provided in two loans of $245,000 each, one from CBK&C to Maria Goodson, and the other from Fred Goodson to Alex Goodson. GX 5; T. 3579.

The new Louisiana video poker statute required prospective operators of video poker machines to obtain a license from the Louisiana State Police. *See* 1991 La. Sess. Law Serv. Act 1062. A prospective operator was required

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[2] The partnership agreement specified that Maria Goodson and Alex Goodson were the limited partners, each holding a 49% ownership interest. GX 2A. The general partner, holding a 2% ownership interest, was a corporation of which Maria and Alex were the sole shareholders. GX 1, 2A. Fred Goodson was the General Manager of the partnership. GX 5.

to complete a license application, pay an application fee, and await the results of a suitability investigation if the State Police chose to conduct one. An operator could apply for renewal of the license annually. Each operator was required to pay the State of Louisiana 22.5% of the net revenue generated by the operator's video poker machines.

In February 1992, Truck Stop Gaming applied for its initial video poker license. GX 5. Consistent with the terms of the limited partnership agreement, the application identified Maria Goodson, Alex Goodson, and the corporate general partner as the owners of Truck Stop Gaming. *Id.* In addition, the applications fully disclosed that Fred Goodson and CBK&C had lent all the start-up capital for the partnership to Alex and Maria Goodson. *See* A. 3a; GX 5. Alex and Maria Goodson signed form affidavits attesting, *inter alia*, that they had no agreements or understandings with any other person to hold their interests as agents, nominees, or otherwise. GX 5. The government later would contend that the applications and affidavits were false, asserting that "[t]he bottom line is Fred and Carl owned this company,"[3] T. 4682, and (inconsistently) that Alex and Maria Goodson were parties to agreements or understandings to transfer their ownership interests in the future. T. 357. It was undisputed, however, that "Alex and Maria Goodson were from inception and remain the record owners of [Truck Stop Gaming] and its corporate general partner." A. 5a.

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[3] The government referred to Cleveland and CBK&C interchangeably, even though CBK&C was a separate entity (a partnership) in which Cleveland held only a 25% interest.

In May 1992, the State Police approved Truck Stop Gaming's application and issued its initial license. GX 6. Truck Stop Gaming submitted renewal applications in 1993, 1994, and 1995, and its license was renewed each time. GX 7-10, 41, 45. Truck Stop Gaming operated video poker machines from 1993 through 1995 and paid the State of Louisiana 22.5% of the revenue generated by the machines, which totaled more than $1.2 million. T. 1017-18, 3800; Order of Aug. 26, 1997 at 12. The State received all monies it was entitled to receive and suffered no loss.

B. The Indictment and the Proceedings in the District Court.

The State of Louisiana never brought any criminal charges based on the submission of any of Truck Stop Gaming's license applications. In 1996, however, the federal government made those same applications the linchpin of a multi-count indictment against petitioner and others.

The mail fraud counts of the indictment charged that the defendants had devised a scheme to deprive "the State of Louisiana and its citizens" of "property" by "fraudulently obtaining and renewing, through the submission of false and incomplete information, state licenses to operate video poker sites." R. 441. The indictment alleged that the license applications failed to disclose "understandings and agreements with unreported parties" and "other factors that could impact the ability of the true owners to obtain licenses." R. 441-42. The mailings underlying the four mail fraud counts were the

mailing by the State Police of the initial license in 1992 and the mailings by the State Police of the license renewals in 1993, 1994, and 1995. R. 442-43.

The mail fraud charges were the springboard for adding more serious charges, including five counts of money laundering that identified the alleged mail fraud as the requisite "specified unlawful activity." R. 444-46. The mail fraud and money laundering offenses, in turn, were alleged as predicate acts of racketeering to support RICO and RICO conspiracy counts. R. 422-23.[4]

On November 15, 1996, co-defendant Fred Goodson moved to dismiss the mail fraud counts and the corresponding alleged predicate acts of racketeering on the ground that an unissued state license does not constitute "property" under 18 U.S.C. § 1341, as five federal circuit courts of appeals had held. Petitioner adopted the motion. On January 14, 1997, the District Court denied the motion, stating that "This Court agrees with the First and Third Circuit's conclusion that licenses constitute

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[4] The indictment also charged petitioner with conducting a gambling business that was illegal under state law (18 U.S.C. § 1955), and participating in or causing interstate communications in aid of racketeering (18 U.S.C. § 1952). R. 443-44, 453-54. Those alleged offenses were also listed as supporting the money laundering and/or RICO counts. However, all defendants were acquitted on the § 1955 charges, and petitioner was acquitted on the § 1952 charge as well. R. 91, 93-94.

Based on income tax returns filed by Truck Stop Gaming, the indictment also alleged tax offenses under 18 U.S.C. § 371 and 26 U.S.C. § 7206. R. 446-53. Petitioner was convicted on two tax charges, R. 91, but those charges had no effect on his sentence.

property even before they are issued." A. 79a. The defendants later requested reconsideration, but the court denied the request. Order of April 22, 1997 at 24-25.

At trial, petitioner was acquitted on five counts, including two mail fraud counts (based on the 1992 and 1993 license applications). R. 90-91. He was found guilty, however, on the other two mail fraud counts (based on the 1994 and 1995 license applications),[5] four money laundering counts, and the RICO and RICO conspiracy counts. *Id.* Without the mail fraud convictions, Cleveland could not have been convicted on the money laundering or RICO charges.[6]

Relying upon the guideline range for money laundering, the District Court sentenced Cleveland – who until this case had never been charged with a crime – to ten years and one month in prison. R. 8614.

C. The Court of Appeals' Ruling.

On appeal, petitioner renewed his contention that an unissued state license is not "property" under the federal mail fraud statute. On July 21, 1999, the Court of Appeals affirmed petitioner's conviction and sentence. A. 1a. The court rejected petitioner's contention concerning unissued licenses, A. 19a, deeming itself bound by *United*

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[5] The information in the 1994 and 1995 applications was identical to the information in the 1992 and 1993 applications.

[6] Mail fraud was the sole "specified unlawful activity" supporting Cleveland's money laundering convictions, and mail fraud and money laundering were predicate acts necessary to support his RICO convictions.

States v. Salvatore, 110 F.3d 1131 (5th Cir.), *cert. denied*, 522 U.S. 981 (1997), which had refused to recognize a distinction between issued and unissued licenses and had held that Louisiana video poker licenses constitute "property" under the mail fraud statute.

After petitioner's appeal had been under submission in the Court of Appeals for more than three months, this Court ruled that materiality is an element of mail fraud. *See Neder v. United States*, 119 S. Ct. 1827 (1999). Because the jury in this case had not been instructed that mail fraud requires proof of materiality, R. 4405-08, petitioner moved for leave to file a supplemental brief addressing *Neder*. On July 13, 1999, the Court of Appeals denied the motion. A. 50a. Eight days later it issued its opinion, which makes no mention of *Neder* or materiality.

REASONS FOR GRANTING THE WRIT

The Courts of Appeals are divided on the question whether unissued state or local licenses are "property" under the federal mail and wire fraud statutes. Six Circuits have held that an unissued license is *not* property. Three Circuits, including the Court of Appeals here, have refused to distinguish between issued and unissued licenses, and have upheld convictions premised on the theory that an unissued license *is* "property."

The question is a recurring and important one that implicates both federalism and the proper role of federal courts in interpreting criminal statutes. If unissued state and local licenses are "property" under the mail and wire fraud statutes, virtually any alleged misrepresentation in

applying for such licenses can be the basis for federal felony charges. Such an interpretation permits the federal government, whenever it chooses, to supplant the authority of States and localities to control the prosecution of alleged fraud relating to licensing procedures that the States and localities design, enact, and administer. Even assuming Congress could confer such broad power on federal prosecutors, the decision below and others like it are contrary to the principle that, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). This Court should resolve the split in the Circuits on this important issue.

Certiorari also should be granted in light of this Court's recent decision in *Neder v. United States*, 119 S. Ct. 1827 (1999), that materiality is an element of mail fraud. The jury in this case was not instructed on that element of the offense. *Neder* was not decided until petitioner's appeal had been under submission in the Court of Appeals for more than three months, and the Court of Appeals apparently did not consider it.

I. THE CIRCUITS ARE SPLIT ON WHETHER UNISSUED STATE OR LOCAL LICENSES CONSTITUTE "PROPERTY" UNDER THE MAIL AND WIRE FRAUD STATUTES.

The federal mail and wire fraud statutes prohibit, among other things, participation in "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations,

or promises." 18 U.S.C. §§ 1341, 1343.[7] The Circuits are split as to whether alleged deceptions of state or local licensing authorities can support a conviction under these statutes, on the theory that an unissued license is "property" of which the State is deprived when it issues the license.

The Court of Appeals here expressly acknowledged the conflict among the Circuits. Although the court's reliance on Fifth Circuit precedent led it to dispose of the issue in three sentences, A. 19a, it pointed out that "at the time of the charged conduct, a circuit split existed as to whether or not unissued licenses constituted property for purposes of the mail fraud statute." A. 20a. That conflict among the Circuits still exists today. *See, e.g., Fourteenth Survey of White Collar Crime*, 36 AM. CRIM. L. REV. 337, 888 (1999) ("Debate exists among the circuit courts about whether permits, licenses, and certificates are considered the 'property' of the government for purposes of prosecuting any fraudulent attempt to acquire such papers.").

A. The Majority of Circuits To Address the Question Have Held That an Unissued License Is Not "Property."

Six Circuits – the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits – have held that an unissued

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[7] Although petitioner was charged with violating the mail fraud statute only, the "money or property" clauses of the two statutes have the same scope. *See Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

state license is not property under the mail and wire fraud statutes.

In *Toulabi v. United States*, 875 F.2d 122 (7th Cir. 1989), the defendant was convicted of mail fraud for causing the City of Chicago to issue taxicab drivers' licenses to persons not entitled to receive them. In an opinion written by Judge Easterbrook, and joined by Judges Posner and Ripple, the Seventh Circuit reversed. The court held that the government had not been deprived of any "property":

> The license may be property from the driver's perspective, in the sense that he may not be compelled to surrender the entitlement except on proof of wrongdoing. For constitutional purposes an entitlement depending on substantive criteria is "property." From the government's perspective, however, the license is a promise not to interfere rather than a sliver of property.

Id. at 125 (citations omitted). The court went on to emphasize that the defendant's conduct "did not deprive Chicago of property; it fattened the City's treasury by $50 (the license fee) for each extra license issued." *Id.*

In *United States v. Murphy*, 836 F.2d 248 (6th Cir.), *cert. denied*, 488 U.S. 924 (1988), the defendant was convicted of mail fraud for obtaining from the State of Tennessee a license to conduct charitable bingo games, through false statements contained in a license application. The Sixth Circuit reversed the conviction, stating:

> [T]he certificate of registration or the bingo license may well be "property" once issued, insofar as the charitable organization is concerned, but certainly an unissued certificate of

> registration is not property of the State of Tennessee and once issued, it is not the property of the State of Tennessee.

836 F.2d at 253-54.

In *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990), *cert. denied*, 500 U.S. 921 (1991), the Eighth Circuit (Richard Arnold, J.) held that

> A governmental permit may in some sense be property in the hands of the person who receives it, but licensing authorities have no property interest in licenses or permits, and allegations that they were obtained by fraud are not sufficient to state an offense under Section 1341.

908 F.2d at 280. Based on that holding, the court ordered stricken from an indictment an allegation that the defendant committed mail fraud by causing the Missouri Department of Revenue to issue a school bus operator's permit based on false statements contained in a permit application. *Id.*

In *United States v. Dadanian*, 818 F.2d 1443 (9th Cir. 1987), *modified on rehearing*, 856 F.2d 1391 (9th Cir. 1988), the defendants were convicted of mail fraud because they obtained poker licenses from the City of Bell through applications that allegedly concealed the identities of persons having ownership interests in the corporate applicant. *See* 818 F.2d at 1445. The Ninth Circuit reversed, holding that "the Dadanians' scheme to obtain the gambling license did not affect the City of Bell's interests as a property-holder." 856 F.2d at 1392. *See also United States v. Kato*, 878 F.2d 267, 269 (9th Cir. 1989) (pilot license is not property under mail fraud statute).

The Second and Eleventh Circuits have likewise held that an unissued state license is not property. *See United States v. Paccione*, 949 F.2d 1183, 1197 (2d Cir. 1991) (waste transporter permit is not property under mail fraud statute), *cert. denied*, 505 U.S. 1220 (1992);[8] *United States v. Shotts*, 145 F.3d 1289, 1294-95 (11th Cir. 1998) (bail bond license is not property under state law and therefore not property under mail fraud statute), *cert. denied*, 119 S. Ct. 1111 (1999).[9] The Fourth Circuit presumably would agree with the majority view. It has held that abbreviated new drug applications in the hands of the FDA and awaiting approval are not "property" of the government under the mail fraud statute. *See Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1137 (4th Cir. 1993), *cert. denied*, 510 U.S. 1197 (1994).

B. Three Circuits Have Upheld Convictions Based on the Theory That an Unissued License Is "Property."

In contrast, the First, Third, and Fifth Circuits have allowed federal prosecutors to predicate mail or wire fraud charges on the notion that an unissued state license constitutes "property." *See United States v. Bucuvalas*, 970

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[8] *See also United States v. Schwartz*, 924 F.2d 410, 417 (2d Cir. 1991) (license issued under Arms Control Export Act is not property under wire fraud statute).

[9] In theory the Eleventh Circuit's analysis in *Shotts*, which focuses on state property law, leaves open the possibility that an unissued state or local license could support a mail or wire fraud charge, if state law treated the unissued license as property. To our knowledge, however, no State has ever treated unissued licenses as property.

F.2d 937, 945 (1st Cir. 1992) (alcohol and entertainment licenses), *cert. denied*, 507 U.S. 959 (1993); *United States v. Martinez*, 905 F.2d 709, 714 (3d Cir.) (medical license), *cert. denied*, 498 U.S. 1017 (1990); *Salvatore*, 110 F.3d at 1138-43 (video poker license). In an opinion by Judge Sloviter, the Third Circuit, emphasizing that "the mail fraud statute was meant to be viewed broadly," concluded:

> We see no reason to make the esoteric distinction between an unissued and issued license which underlies the *Murphy*, *Kato* and *Dadanian* opinions. . . . As noted in the seminal article by Professor Reich, a license is essentially one manifestation of the government "largess" of the modern state which "is originally public property, comes from the state, and may be withheld completely." Reich, *The New Property*, 73 YALE L.J. 733, 778 (1964).

Martinez, 905 F.2d at 714-15.

The Fifth Circuit reached a similar conclusion in *Salvatore*, the decision it followed in this case. A. 19a. Stressing that "the concept of property rights should be given a broad interpretation for the purposes of the mail fraud statute," the *Salvatore* court held that unissued Louisiana video poker licenses constitute "property" of which the State is deprived when it issues such licenses. 110 F.3d at 1139, 1143. The court stated its "full agreement" with the Third Circuit's conclusion that the distinction between issued and unissued licenses is " 'esoteric.' " *Id.* at 1140. The court also stressed that traditional property law recognizes that *licensees* have a protected property interest in

their *issued* licenses, *id.* at 1142-43,[10] but apart from certain federal decisions under the mail and wire fraud statutes did not cite any case law or statute recognizing that a governmental body, as *licensor*, has a property interest in *unissued* licenses. Nevertheless, the court held that the "property" requirement had been satisfied.

C. The Question Is Important.

The mail and wire fraud statutes have been used to prosecute a wide variety of allegedly fraudulent conduct, much of which is only tangentially related to the mails or wires.[11] Allegations of mail and wire fraud are also frequently used as the basis for RICO and money laundering charges – as they were in this case – because mail and wire fraud constitute predicate acts under the RICO statute and "specified unlawful activity" under the money laundering statutes. *See* 18 U.S.C. §§ 1956, 1957 & 1961(1). The scope and meaning of the mail and wire fraud statutes are thus matters of particular significance.

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[10] The court emphasized this point despite the specific provision of the video poker statute that even an *issued* license "is not property or a protected interest under the constitutions of either the United States or the state of Louisiana." *See* La. Rev. Stat. Ann. § 33:4862.1(D) (recodified at La. Rev. Stat. Ann. § 27:301(D)).

[11] *See, e.g.*, John C. Coffee & Charles V. Whitehead, *The Federalization of Fraud: Mail and Wire Fraud Statutes, in* WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES, § 9.01, at 9-2 (O. Obermaier & R. Morvillo eds., 1990) ("Federal prosecutors have long followed the maxim, 'When in doubt, charge mail fraud.' ").

The issue here is especially important because of the enormous number of state and local licenses applied for every year and the wide range of activities for which licenses are issued. In addition to video poker, States and localities issue licenses and permits with respect to such diverse matters as serving liquor or food; possession of firearms; selling insurance; driving taxicabs and other motor vehicles; and the practice of law, medicine, dentistry, psychology, engineering, accounting, and other professions.[12] In the vast majority of cases, license applications are submitted, or approved licenses are transmitted, through the United States mail. In the unusual case where that is not true, some part of the licensing process likely will involve one or more facsimile or other wire communications. Therefore, to hold that unissued licenses are "property" under the mail and wire fraud statutes allows a federal felony prosecution to be brought based on virtually any alleged deception in a state or local license application.

Such a result is fundamentally inconsistent with the traditional division of responsibility between the States and the federal government. As this Court declared in *United States v. Lopez*, 514 U.S. 549 (1995), "[u]nder our

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[12] *See, e.g.*, Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 6, 10 (1976) ("[A] cynic might conclude that virtually the only people who remain unlicensed in at least one of the United States are clergymen and university professors . . . . In recent decades occupational licensing has grown explosively."); Douglas A. Wallace, *Occupational Licensing and Certification: Remedies for Denial*, 14 WM. & MARY L. REV. 46, 46 (1972) ("In the past three to four decades, occupational licensing has become one of the most pervasive forms of state regulation of the economy.").

federal system, the 'States possess primary authority for defining and enforcing the criminal law.' " *Id.* at 561 n.3 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). For that reason,

> Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. This congressional policy is rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines. . . . *[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.*

United States v. Bass, 404 U.S. at 349 (emphasis added); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *Rewis v. United States*, 401 U.S. 808, 811-12 (1971); *Evans v. United States*, 504 U.S. 255, 292 (1992) (Thomas, J., dissenting).

In *Toulabi*, one of the decisions holding that unissued licenses are not property, Judge Easterbrook questioned why the federal mail fraud statute should be read to encompass conduct that clearly could be prosecuted under state or local laws: "Why the United States should be so interested in enforcing the laws of the City of Chicago is something of a mystery. . . . State and local governments commonly prosecute violations of their own laws . . . . " *Toulabi*, 875 F.2d at 123 (quotation omitted). It would be a rare case indeed in which there were no state offense that could be charged based on a fraudulent license application, if state authorities deemed a prosecution appropriate.

This case illustrates why the federal government's intrusion into the field of state licensing, through an expansive interpretation of the mail fraud statute, is

unwarranted. In 1991 the State of Louisiana passed a new law to allow video poker machines. 1991 La. Sess. Law Serv. Act 1062 (West) (codified as amended at La. Rev. Stat. Ann. § 27:301 *et seq.*). As part of that law, the State set up a licensing process, *id.*, sec. 1, § 4862.6, and provided that license applicants would be subject to criminal penalties if they submitted false statements in connection with their applications. *Id.*, sec. 1, § 4862.9(A). The State also delegated to a state entity (the State Police) the responsibility to formulate regulations concerning the licensing process; to deny, condition, suspend, or revoke licenses; to levy fines of up to $1,000 per violation; and to inspect premises where video poker devices are offered for play. *Id.*, sec. 1, § 4862.8. Plainly, video poker operations are the subject of extensive state regulation.[13] Yet it was the federal government – not the State – that brought criminal charges based on the alleged submission of fraudulent license applications.

D. The Decisions Holding That Unissued Licenses Are "Property" Are Incompatible With the Proper Function of Federal Courts in Interpreting Criminal Statutes.

Review is also warranted because the federal appellate decisions holding that unissued licenses are

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[13] *See Southwest Gaming Servs. v. Caddo-Shreveport Sales & Use Tax Comm'n*, 661 So.2d 662, 663 (La. Ct. App. 1995) ("The obvious legislative purpose behind [the Louisiana video poker statute] was to provide a comprehensive framework for the regulation of the video poker industry, vesting regulatory powers exclusively in the video gaming division of the state police.").

"property" depart dramatically from the appropriate function of the federal judiciary in construing criminal statutes.

"Federal crimes are defined by Congress, not the courts." *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997). "[F]ederal judges are not free to devise new crimes to meet the occasion. . . . 'Courts must resist th[e] temptation [to stretch criminal statutes] in the interest of the long-range preservation of limited and even-handed government.' " *Evans*, 504 U.S. at 295 (Thomas, J., dissenting) (quoting *United States v. Mazzei*, 521 F.2d 639, 656 (3d Cir. 1975) (en banc) (Gibbons, J., dissenting)) (alteration in original). As this Court declared in an early decision under the mail fraud statute, there are "no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo v. United States*, 272 U.S. 620, 629 (1926); *see also United State v. Maze*, 414 U.S. 395, 405 n.10 (1974) ("If the Federal Government is to engage in combat against fraudulent schemes not covered by the [mail fraud] statute, it must do so at the initiative of Congress and not of this Court.").[14]

The Fifth Circuit's conclusion that the concept of "property" in the mail and wire fraud statutes should be given "a broad interpretation," *Salvatore*, 110 F.3d at 1139, is based on a misreading of this Court's decision in

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[14] *Cf. Brogan v. United States*, 522 U.S. 398, 406 (1998) (refusing to adopt "expansive, user-friendly judicial rule" with respect to 18 U.S.C. § 1001); *United States v. Kozminski*, 487 U.S. 931, 951 (1988) (rejecting expansive definition of key term in 18 U.S.C. § 241).

McNally v. United States, 483 U.S. 350 (1987).[15] As the Second Circuit explained in rejecting the government's argument in an earlier case that "property" should be interpreted broadly,

> [T]he Court said [in *McNally*] that "the phrase 'any scheme or artifice to defraud' is to be interpreted broadly insofar as property rights are concerned." This quotation means that once a property right is found, any attempt to take the right by trickery is punishable, but it implies nothing about when to find a property right.

United States v. Evans, 844 F.2d 36, 40 (2d Cir. 1988) (quoting *McNally*, 483 U.S. at 356).

The notion that a state or local government is deprived of its "property" when it issues a license or permit finds no support in the law of property, and none in the language or purposes of the mail and wire fraud statutes.[16] Whether this notion can nonetheless be

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[15] *See United States v. Loney*, 959 F.2d 1332, 1336 (5th Cir. 1996) ("[W]e construe 'property' in a broad sense for purposes of the federal fraud statutes. *McNally*, 483 U.S. at 356."), *cited in Salvatore*, 110 F.3d at 1139.

[16] The *Salvatore* court cited this Court's decision in *Carpenter v. United States*, 484 U.S. 19 (1987), as support for its conclusion. *See* 110 F.3d at 1142. But *Carpenter* held that confidential business information of a private corporation was "property" under the mail and wire fraud statutes because it "has long been recognized as property" at common law. 484 U.S. at 26 (citing, *inter alia*, *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250-51 (1905); *International News Service v. Associated Press*, 248 U.S. 215, 236 (1918)). In contrast, unissued state licenses have never been viewed as property under the common law (or Louisiana civil law).

engrafted onto the mail and wire fraud statutes is a question that warrants this Court's attention.

II. THE COURT OF APPEALS DID NOT CONSIDER THIS COURT'S RECENT HOLDING IN *NEDER V. UNITED STATES*.

Certiorari also should be granted because, contrary to this Court's recent decision in *Neder v. United States*, 119 S. Ct. 1827 (1999), the jury was not instructed that materiality is an element of mail fraud. Had it been so instructed, it might well have returned verdicts of acquittal.

At the time of petitioner's trial, the law in the Fifth Circuit was that mail fraud did not require proof of materiality of falsehood.[17] Thus, the District Court's instructions to the jury on the mail fraud counts did not require the jury to find materiality. R. 4406-08. However, on June 10, 1999 – while petitioner's appeal was under

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[17] In *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1129 (5th Cir. 1988), *vacated on other grounds sub nom. Fryar v. Abell*, 492 U.S. 914, *and cert. denied*, 492 U.S. 918 (1989), the Fifth Circuit held that "Materiality and reliance . . . are *not* elements of either wire fraud or mail fraud." (Emphasis in original). *Accord, Laird v. Integrated Resources, Inc.*, 897 F.2d 826, 839 & n.53 (5th Cir. 1990); *Ruffu v. Johnson & Johnson*, 181 F.R.D. 341, 343 (E.D. Tex. 1998); *George v. Blue Diamond Petroleum, Inc.*, 718 F. Supp. 539, 550 (W.D. La. 1989), *aff'd without op.*, 922 F.2d 838 (5th Cir. 1990); *Fifth Circuit Pattern Jury Instructions: Criminal*, Instruction 2.60 (1997). Prior to *Neder*, the Fifth Circuit recognized materiality as significant only in the case of mail fraud charges alleging a scheme or artifice to deprive another of the intangible right of honest services. *See, e.g., United States v. Gray*, 96 F.3d 769, 774-75 (5th Cir. 1996), *cert. denied*, 520 U.S. 1129 (1997).

submission to the Court of Appeals – this Court held in *Neder* that mail fraud does require proof of materiality. 119 S. Ct. at 1841.

Changes in the substantive law apply to all criminal cases pending on direct appeal. *See, e.g., Johnson v. United States*, 520 U.S. 461, 467-68 (1997). Therefore, petitioner moved the Court of Appeals for leave to submit a supplemental brief of 2500 words or less addressing whether *Neder* provided a new basis for reversal. On July 13, 1999, the Court of Appeals denied that motion without explanation, A. 50a, and eight days later it issued its opinion, which does not mention *Neder* or materiality. A. 1a.

When it appears that a Court of Appeals may not have considered a recent decision of this Court or some other controlling authority, this Court's practice is to grant the petition for certiorari, vacate the decision below, and remand for further consideration of the new authority ("GVR"). *See, e.g., Lords Landing Village Condominium Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 896-97 (1997) (per curiam); *Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (per curiam) (citing cases); *Stutson v. United States*, 516 U.S. 193, 197-98 (1996) (per curiam); *Grier v. United States*, 419 U.S. 989, 989 (1974); *Lawrence*, 516 U.S. at 181 (Scalia, J., dissenting). The GVR procedure is especially appropriate in criminal cases, because "When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated." *Stutson*, 516 U.S. at 196.

Here the Court of Appeals "does not appear to have fully considered," if it considered at all, this Court's decision in *Neder*. *Lawrence*, 516 U.S. at 167. *Neder* was not decided until more than three months after the Court of Appeals had heard oral argument on petitioner's appeal. Petitioner's motion to file a supplemental brief concerning *Neder* was denied without comment, A. 50a, and shortly thereafter the Court of Appeals issued its opinion, which does not refer to *Neder* or materiality.[18] In these circumstances a GVR order is appropriate. *See, e.g., Lords Landing*, 520 U.S. at 896-97 ("It is true that petitioners brought *Sheets* to the attention of the Court of Appeals in a motion to stay or recall its mandate and that the Court of Appeals denied this motion. But the Court of Appeals' ambiguous statement that petitioners' request was 'without merit' does not establish that it actually considered and rejected petitioners' *Sheets* argument."); *Stutson*, 516 U.S. at 196 (issuing GVR order where Court of Appeals may not have "fully consider[ed]" the import of a recent, but prior, decision of this Court).

A full consideration of *Neder* is imperative in this case because the defense presented substantial evidence at trial that the alleged fraudulent omissions in Truck Stop Gaming's license applications would not have been

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[18] Petitioner raised *Neder* in his rehearing petition as well, but that petition also was denied without comment. A. 45a.

important to the State Police. This evidence included the following:

– A former Louisiana State Police employee testified that the form affidavits required to be submitted with license applications, which contained statements the government contended were fraudulent here, were a "mere formality" that generally were not considered by the State Police and were later eliminated for a period of time as unnecessary. T. 3585-87, 3671.

– The same former employee testified that the State Police were concerned primarily with the current ownership of the applicant, and generally were not interested in knowing about any agreements to assign ownership interests in the future. T. 3585, 3590-91. One of the government's theories of fraud was that the license applications concealed agreements to transfer ownership interests in the future. T. 357.

– The license applications disclosed that "Fred Goodson and CBK&C had loaned Maria and Alex all initial capital" of the partnership. A. 3a. The government contended, however, that Fred Goodson and Carl Cleveland[19] were owners of the partnership, not merely lenders, and that not revealing their purported ownership was important because owners were subject to suitability investigations by the State Police. But a State Police officer testified that lenders were also subject to

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[19] The government's substitution of Cleveland personally for his law firm was not supported by any evidence. The law firm was a distinct juridical entity under Louisiana law, and no basis for ignoring it was established.

suitability investigations. T. 957-58, 1004, 1011. Moreover, Fred Goodson was in fact investigated by the State Police. T. 1006-07, 1024.

In light of this and other evidence, the absence of a materiality instruction on the mail fraud counts may well have meant the difference between acquittal and conviction, especially in a case in which the jury deliberated for more than seven days and acquitted petitioner on several counts. This omission from the jury charge implicated at least two constitutional rights: the Fifth Amendment right not to be convicted without a determination that all elements of the offense have been proved beyond a reasonable doubt, and the Sixth Amendment right to have a jury make that determination. Indeed, in this case *no one* – not even the trial judge – has determined whether the alleged falsehoods in the license applications were material.

If this Court does not grant plenary review, it should grant certiorari, vacate the decision below, and remand to the Court of Appeals for reconsideration in light of *Neder*.[20]

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[20] On review by the Court of Appeals, the plain error standard would apply because petitioner, consistent with Fifth Circuit law at the time of trial, did not request a materiality instruction. Under *Neder*, however, there indisputably was error. Moreover, "in cases such as this – where the law at the time of trial was settled and clearly contrary to the law at the time of appeal – it is enough that an error be 'plain' at the time of appellate consideration." *Johnson*, 520 U.S. at 468. When this case was tried, it was settled in the Fifth Circuit that materiality is *not* an element of mail fraud. *See* note 17, *supra*. But it is now settled that materiality *is* an element of mail fraud, and under

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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November 8, 1999

Johnson the error in not instructing the jury on materiality is therefore "plain." For the reasons stated in the text, the error could well have meant the difference between acquittal and conviction and therefore "affects substantial rights." *United States v. Olano*, 507 U.S. 725, 734 (1993). Finally, given the evidence of lack of materiality and the closeness of the case, the absence of any determination by the jury or even the trial judge that this essential element of the offense was proven is an "error [that] 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Id.* at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

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APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross-Appellant,

v.

LARRY S. BANKSTON; MARIA F. GOODSON,
Defendants-Appellants-Cross-Appellees,

CARL W. CLEVELAND; FRED H. GOODSON,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARIA F. GOODSON,
Defendant-Appellant,

ALEXANDROS F. GOODSON; TRUCK STOP GAMING LTD.,
Intervenors-Appellants.

Nos. 97-31057, 98-30471.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

July 21, 1999.

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Lewis O. Unglesby, Karl J. Koch, Unglesby & Koch, Baton Rouge, LA, for Bankston.

William H. Jeffress, Jr., Paul Francis Enzinna, Miller, Cassidy, Larroca & Lewin, Washington, DC, for Goodson.

Paul Mogin, Robert B. Barnett, Joseph G. Petrosinelli, Williams & Connolly, Washington, DC, Anthony J. Marabella, Jr., Baton Rouge, LA, for Cleveland.

Katherine G. Wheeler, Steffes & Macmurdo, Baton Rouge, LA, Richard George Crane, Nashville, TN, for Goodson.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before KING, Chief Judge, and REAVLEY and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

Larry Bankston ("Bankston"), Fred Goodson, Maria Goodson, and Carl Cleveland ("Cleveland") appeal from their June 27, 1997, convictions and October 15, 1997, sentences for various offenses related to criminal activity in the Louisiana video poker industry. Fred Goodson and Cleveland, along with Alex Goodson, Maria Goodson, and Truck Stop Gaming, Inc. ("TSG, Inc."), additionally appeal the district court's judgment of forfeiture of Truck Stop Gaming, Ltd. ("TSG, Ltd.") and TSG, Inc. as part of the RICO enterprise. The Government cross-appeals, challenging the district court's calculation of both Bankston's and Maria Goodson's sentences. For the reasons set forth below, we affirm the Appellants' convictions and sentences and the forfeiture of TSG, Ltd. and TSG, Inc.

I. Background

Fred Goodson and his family had been in the truck stop business in Slidell, Louisiana for 20 years. In early 1992, the Goodson family formed TSG, Ltd. and its corporate partner, TSG, Inc., in order to participate in the video poker business at their Slidell truck stop. Fred Goodson

and Carl Cleveland's law firm, Cleveland, Barrios, Kingsdorf & Casteix ("CBK&C"), loaned Goodson's adult children, Alex and Maria, the start-up capital for TSG, Ltd.[1] With the legal assistance of CBK&C, a partnership *in commendam* was established. Alex and Maria each owned 49% of TSG, Ltd. as limited partners.[2] TSG, Inc. owned the remaining 2% as general partner.[3] Fred Goodson managed TSG, Ltd.

CBK&C also helped the Goodsons prepare and submit to the Louisiana State Police applications for an owner/operator's gaming license for TSG, Ltd. The gaming applications required partnerships seeking a license to identify their partners, to submit personal financial statements for all partners, and to affirm that the listed partners were the sole beneficial owners, that no partner had an arrangement to hold his interest as "an agent, nominee or otherwise," or a present intention to transfer any interest in the partnership at a future time. The initial application submitted on behalf of TSG, Ltd. identified Maria and Alex Goodson as the limited partners and TSG, Inc. as the general partner. The application listed no other persons or entities as having any ownership interest in TSG, Ltd. The initial license application did disclose, however, that Fred Goodson and CBK&C had loaned Maria and Alex all initial capital. That same application also identified Fred Goodson as general manager of the

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[1] Those loans were secured by promissory notes, payable on demand, with 10% annual interest.

[2] TSG, Ltd.'s Agreement of Partnership was signed by Alex and Maria and filed with the Louisiana Secretary of State.

[3] Alex and Maria owned equal shares of TSG, Inc.

business. TSG, Ltd. submitted renewal applications in 1993, 1994, and 1995, which also listed no additional ownership interests.[4]

In 1994, as a part of an unrelated federal investigation of alleged corruption involving Louisiana legislators, the F.B.I. obtained court authorization to conduct electronic surveillance of the office of Louisiana State Senator Larry Bankston. The authorization was based on a series of consensually recorded conversations that took place in September and October 1994 between Bankston and Robert Miller, a cooperating witness. According to the FBI, the Bankston-Miller conversations indicated that Bankston was engaged in a scheme to extort an interest in a casino proposed by the Jena Choctaw tribe, in exchange for his influence in ensuring government approval of the casino.

During the course of its electronic surveillance – limited to the interception of communications concerning the alleged Jena Choctaw scheme – the FBI recorded a conversation between Bankston and Fred Goodson. In that conversation, the two men discussed, in detail, Goodson's truck stop business. Neither man mentioned the Jena Choctaw scheme. Approximately 20 minutes into their discussion, Goodson broached the subject that would form the basis for the present multi-party, multi-count indictment. Armed with the recording of Bankston

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[4] In August 1994, Maria Goodson executed a "Sale of Partnership Interest and Pledge Agreement," which conveyed to Benny Rayburn, the adult son of co-defendant Benjamin "Sixty" Rayburn, a 4.99% interest in TSG, Ltd. Rayburn's 4.99% interest was not disclosed in any renewal application.

and Goodson's 44-minute conversation, the FBI obtained court authorization for electronic surveillance on Goodson's home and businesses.

On October 4, 1996, the Government charged now former Louisiana State Senators Benjamin "Sixty" Rayburn and Larry Bankston; video poker entrepreneur Fred Goodson; his daughter, Maria Goodson; family attorney, Carl Cleveland; and the family's accountant, Joe Morgan, with a combination of racketeering, racketeering conspiracy, mail fraud, conducting an illegal gambling business, money laundering, tax conspiracy, false declaration under penalty of perjury, aiding and abetting a false declaration under penalty of perjury, and interstate communications in aid of racketeering.[5] Most of the charges against the Goodsons, Cleveland, and Joe Morgan related to the establishment, licensing, and operation of TSG, Ltd. The Government alleged that the defendants had schemed to defraud state regulators in obtaining video poker licenses for TSG, Ltd., and to obtain favorable legislation affecting Louisiana's video poker industry. Specifically, the Government alleged that the defendants obtained a gaming license for TSG, Ltd. in 1992 and renewed it in 1993, 1994, and 1995, by fraudulently concealing the identity of the true owners of the company, Fred Goodson and Carl Cleveland.[6] According to the

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[5] The Government did not indict Fred Goodson's son, Alex Goodson, but subsequently named him an unindicted co-conspirator. Alex Goodson joins the instant action as an interveror in the forfeiture proceedings.

[6] Alex and Maria Goodson were from inception and remain the record owners of TSG, Ltd. and its corporate general partner, TSG, Inc.

Government, Goodson and Cleveland concealed their ownership in order to avoid the probing inquiry of the State's suitability assessment.

Trial commenced on May 12, 1997, and lasted six weeks. Following more than seven days of deliberation, the jury returned a mixed verdict, finding four of the defendants – Carl Cleveland, Fred Goodson, Maria Goodson, and Larry Bankston – guilty of certain counts.[7] The jury acquitted the remaining two defendants – Senator Rayburn and Joe Morgan – on all counts.

On October 15, 1997, the district court sentenced the four convicted defendants. Both Cleveland and Fred Goodson received terms of imprisonment of 121 months. Maria Goodson received a six-month term of imprisonment to be followed by six months of home detention. Bankston received a 41-month term of imprisonment and a fine of $20,000.

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[7] Cleveland was convicted on one count of RICO, one count of RICO conspiracy, two counts of mail fraud (in connection with the 1994 and 1995 TSG, Ltd. gaming license renewal applications), four counts of money laundering, one count of tax conspiracy, and one count of aiding and abetting the filing of a false tax return. Like Cleveland, Fred Goodson was convicted of one count of RICO, one count of RICO conspiracy, and two counts of mail fraud (in connection with the 1994 and 1995 TSG, Ltd. gaming license renewal applications). The jury additionally convicted Goodson of five counts of money laundering and three counts of the use of interstate communications in aid of state bribery. His daughter, Maria, was found guilty of one count of mail fraud in connection with TSG, Ltd.'s 1995 license renewal application. Former Senator Bankston was found guilty of two counts of committing and/or aiding and abetting interstate communications in aid of racketeering.

The defendants filed timely notices of appeal as to their convictions and sentences. On November 14, 1997, the Government filed a notice of cross-appeal relating to the sentences of Bankston and Maria Goodson.

Following Fred Goodson's and Carl Cleveland's convictions for RICO and RICO conspiracy, the Government sought forfeiture of, *inter alia*, their alleged interests in TSG, Ltd. and TSG, Inc. On August 26, 1997, the district court entered a judgment ordering the forfeiture of TSG, Ltd. and TSG, Inc. The district court noted that the jury's verdict and the evidence in the criminal trial record proved beyond a reasonable doubt that Goodson and Cleveland had an interest in TSG, Ltd. and TSG, Inc. and that those entities were part of the RICO enterprise. On October 21, 1997, the district court entered the final order of forfeiture.

On October 31, 1997, Alex and Maria Goodson, as record owners of TSG, Ltd. and TSG, Inc., filed separate petitions of intervention in the forfeiture proceedings, asserting their ownership interests in the two companies. On February 4, 1998, the district court conducted an evidentiary hearing on their petitions, and on April 15, 1998, the district court denied their claims. The district court ruled that Fred Goodson and Carl Cleveland were the "true owners" of TSG, Ltd. and TSG, Inc. and that their ownership interests had been properly forfeited to the Government. Alex and Maria Goodson and TSG, Inc. appeal from that ruling.

II. Discussion

A. Wiretap Evidence

1. Application Omissions

Fred Goodson and Larry Bankston argue that the district court erred in refusing to suppress the evidence obtained from the Bankston wiretap. Both appellants additionally argue that the district court erred in denying their request for an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

Before trial, Bankston filed a motion to suppress the wiretap evidence. Fred Goodson, Maria Goodson, and Carl Cleveland joined the motion.[8] Bankston contended that the November 25, 1994, affidavit completed by Agent Jones in support of the wiretap application contained fatal omissions and misrepresentations. His motion described an "exculpatory" conversation between Bankston and Miller that had been omitted from the wiretap application and claimed that the FBI told Miller to stop recording after that conversation. Bankston asserted that the false statements and/or omissions were deliberately or recklessly made. He accompanied his motion with an offer of proof including affidavits and sworn testimony.

The district court, after hearing arguments by counsel and reviewing submissions, denied Bankston's

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[8] On appeal, Maria Goodson and Carl Cleveland cross-incorporate Fred Goodson and Bankston's suppression arguments. However, neither Maria nor Cleveland meets our standing requirements as articulated in *United States v. Scasino*, 513 F.2d 47 (5th Cir.1975). Because we conclude that the district court did not err in admitting the wiretap evidence, we need not consider Cleveland's argument that he has standing despite *Scasino*.

request for a *Franks* evidentiary hearing. The court found that Bankston had failed to make the requisite showing that the affiant, Agent Jones, had intentionally misled the District Court and tricked the Court into issuing the wiretap authorization and that the omissions were material such that they negated probable cause.

We review de novo the denial of a *Franks v. Delaware* evidentiary hearing. *See United States v. Dickey*, 102 F.3d 157, 162 (5th Cir.1996) (reviewing the denial of a Franks hearing in the context of a search warrant); *United States v. Guerra-Marez*, 928 F.2d 665, 671 (5th Cir.1991) (applying the *Franks* standard and reviewing de novo the decision of the district court to validate a wiretap order). In *Franks v. Delaware*, the Supreme Court held that a defendant is entitled to an evidentiary hearing to contest the validity of a search warrant if he makes a substantial preliminary showing that (1) allegations in a supporting affidavit were a deliberate falsehood or made with a reckless disregard for the truth and (2) the remaining portion of the affidavit is not sufficient to support a finding of probable cause. *See Franks*, 438 U.S. 154, 171, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667 (1978). We have explained that "even if the defendant makes a showing of deliberate falsity or reckless disregard for the truth by law enforcement officers, he is not entitled to a hearing if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause." *United States v. Privette*, 947 F.2d 1259, 1261 (5th Cir.1991) (quoting *Franks*, 438 U.S. at 171-72, 98 S.Ct. at 2684-85).

We have applied *Franks* to instances of omission where, as here, an affidavit falls squarely within the

dictates of 18 U.S.C. § 2518. *United States v. Tomblin*, 46 F.3d 1369, 1377 (5th Cir.1995) (noting that "[o]missions or misrepresentations can constitute improper government behavior"). In such cases of omitted information, the logic of *Privette* holds firm: a defendant is not entitled to an evidentiary hearing if a wiretap authorization would lawfully have issued after correcting the supporting affidavit by supplying any material omissions. Therefore, in determining whether Fred Goodson and Bankston were improperly denied an evidentiary hearing on their motion to suppress, we need only consider Agent Jones's affidavit – corrected to contain the allegedly exculpatory conversation – and determine whether that reconstructed affidavit satisfies the wiretap requirements contained in 18 U.S.C. § 2518.

If the Jones affidavit were revised to include the omitted information, the affidavit would describe conversations suggesting that between September 19 and October 31, 1994, the cooperating witness, Miller, and Bankston had discussed a scheme to exchange Bankston's influence for an ownership interest in the Jena Choctaw casino. In particular, the affidavit would reveal that Bankston had met with Jena Choctaw Chief Jackson several times, had agreed to provide the Jena Choctaw tribe with "political cover," and had been telephoned frequently by Chief Jackson. The affidavit would also state that, in a sixth conversation with Miller on October 31, 1994, Bankston had declared that he was "fini" and that his present intention was "to stay away from . . . this entire thing." The affidavit would additionally include statements made by Bankston to Miller at the conclusion of that October 31, 1994, conversation expressing Bankston's

"willing[ness] to proceed" with the project if "something could be worked out to his satisfaction."

a. Probable Cause

An application for a wiretap must demonstrate probable cause to believe that the target has committed, is committing, or will commit a crime, as well as "probable cause for belief that particular communications concerning that offense will be obtained through such interception." 18 U.S.C. § 2518(3)(a)-(b). We evaluate probable cause utilizing a totality-of-the-circumstances test. *See Dickey*, 102 F.3d at 162. In light of Miller's multiple statements to the FBI that Bankston was negotiating a deal in which he would extort an undisclosed interest in the Jena Choctaw casino, the multiple taped conversations containing statements that corroborated this tip from Miller, and the ambiguity of any exculpatory statements in the October 31 conversation, we find that the reconstructed affidavit would establish sufficient probable cause to authorize electronic surveillance on November 25.[9]

b. Necessity

Bankston and Goodson also argue that the application failed to meet the dictates of 18 U.S.C. § 2518(3)(c),

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[9] Our finding of probable cause includes a finding that "particular communications" concerning that offense would have been "obtained through such interception." *See* 18 U.S.C. § 2518(3)(b). The October 31, 1994, conversation between Miller and Bankston in no way undermines probable cause to believe that Bankston would have committed the Jena Choctaw scheme and that particular communications concerning the scheme would occur either in Bankston's office or on his phone.

which requires the Government to show and the issuing judge to find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(3)(c). The Government "need not prove exhaustion of every conceivable option before a wiretap order may issue." *Guerra-Marez*, 928 F.2d at 671.

Here, the FBI included in its 21-page wiretap application a detailed account of the investigative techniques it had employed in making its case against Bankston. Agent Jones stated in his November 25, 1994, affidavit that the use of electronic surveillance was necessary because Bankston had made it clear to Miller that he would not include him in any potentially incriminating conversations with third parties.[10]

We have affirmed wiretap orders based upon similar affidavits. *See, e.g., United States v. Krout*, 66 F.3d 1420, 1425 (5th Cir.1995) (explaining that the informants or undercover agents could not infiltrate the conspiracy at high enough levels); *United States v. Collins*, 972 F.2d 1385, 1412 (5th Cir.1992) (noting that consensual monitoring would be impossible, as it was unlikely that the informant would be present during the illegal activity). Agent Jones's affidavit provides sufficient information to meet

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[10] In his talks with Miller, Bankston had alluded to conversations that he would be having with his stockholder nominee as well as other people in Louisiana whom he had to satisfy out of his five-percent hidden ownership interest in the Jena Choctaw casino.

the requirements of § 2518(3)(c). The omission of the October 31 conversation does not impact our finding of "necessity," nor does the fact that the FBI failed to inform the issuing court that Miller had been told to cease recording his conversations with Bankston. Regardless of whether Miller continued to record his conversations with Bankston, Miller was unlikely to be present during the talks between Bankston and his Louisiana contacts. Therefore, a need for electronic surveillance existed.

2. Minimization

Bankston and Fred Goodson contest the district court's factual finding that the FBI properly minimized the interception of communications outside the scope of the wiretap order. In particular, Bankston and Goodson dispute the interception of their December 1994 conversation, which included no mention of the Jena Choctaw tribe casino scheme and did not broach the subject of criminal activity until approximately twenty minutes into the conversation. We review determinations of the reasonableness of minimization efforts for clear error. *See United States v. Wilson*, 77 F.3d 105, 112 (5th Cir.1996).

Section 2518 implements "the constitutional mandate . . . that wiretapping must be conducted with particularity," *United States v. Daly*, 535 F.2d 434, 440 (8th Cir.1976) (citation omitted), by requiring electronic surveillance to "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. § 2518(5). The Government's efforts to minimize nonrelevant conversations must be "objectively reasonable" in light of the circumstances

confronting the interceptor. *Scott v. United States*, 436 U.S. 128, 136-143, 98 S.Ct. 1717, 1723-27, 56 L.Ed.2d 168 (1978); *see also United States v. Hyde*, 574 F.2d 856, 869 (5th Cir.1978) (explaining that the minimization standard applies a test of reasonableness to the particular facts of each case) (citing *Daly*, 535 F.2d at 441). Neither the Fourth Amendment nor 18 U.S.C. § 2515, however, requires government agents to avoid intercepting all non-relevant conversations when conducting a wiretap investigation. *See Scott*, 436 U.S. at 137-140, 98 S.Ct. at 1723-24.

We consider three factors in deciding the objective reasonableness of efforts to minimize: (1) the "nature and scope of the criminal enterprise under investigation;" (2) the "Government's reasonable inferences of the character of a conversation from the parties to it;" and (3) the "extent of judicial supervision." *Hyde*, 574 F.2d at 869. Here, consistent with our precedent, the district court found that the FBI's efforts to minimize were reasonable in light of the fact that (1) the criminal investigation involved "a potentially wide-ranging conspiracy in which the coconspirators had not been identified;" (2) Goodson reported to Bankston "specific details of Goodson's truck stop business that one would not normally provide to one who was not a participant in the endeavor;" and (3) the issuing court had determined, based on regularly submitted ten-day reports, including the results of interceptions, that the Government was acting in a proper manner.

Bankston reurges statistical analyses he presented to the district court to question the Government's minimization efforts. Bankston's reliance on statistics is unpersuasive. First, the district court rightly pointed out that Bankston's statistics, even if taken as accurate, showed

minimization efforts that were reasonable. Second, the Supreme Court has discouraged the use of statistics, explaining that "blind reliance on the percentage of non-pertinent calls intercepted is not a sure guide to the correct answer." *Scott*, 436 U.S. at 140, 98 S.Ct. at 1724.

Goodson argues that the criminal nature of the December 1994 conversation could not have been immediately apparent because the subject of criminal activity was not broached until approximately twenty minutes into the conversation and that, by this point, agents should have already ceased monitoring the conversation. Goodson analogizes an agent's monitoring of communications concerning crimes not the subject of a wiretap order to an officer's seizure of contraband pursuant to the plain view doctrine. Goodson cites *United States v. Johnson*, 539 F.2d 181 (D.C.Cir.1976), in support of his novel plain view analogy. In particular, Goodson points to the following language from *Johnson*: "Like an officer who sees contraband in plain view from a vantage point where he has a right to be, one properly overhearing unexpected villainy need not ignore such evidence." *See id.* at 188. Goodson then attempts to graft onto the *Scott* objective reasonableness inquiry the plain view doctrine's probable cause requirement. He urges us to find that an agent monitoring "windfall" communications must, at the time of the monitoring, have probable cause to believe that the communication concerns criminal activity.

Caselaw does not support such a probable cause requirement. We are unaware of any case in which an appellate court employed a probable cause analysis to determine whether to suppress non-minimized, "other

criminal activity" communications. Moreover, requiring probable cause that a windfall communication itself concerns criminal activity is inconsistent with the objective reasonableness inquiry. Adding a probable cause analysis would require that monitoring agents be more than reasonable in their efforts to minimize. Goodson's approach would require that agents be gifted with "prescience" and the ability to " 'know in advance what direction the conversation will take.' " *United States v. Cox*, 462 F.2d 1293, 1301 (8th Cir.1972) (quoting *United States v. LaGorga*, 336 F.Supp. 190, 196 (W.D.Pa.1971)). Consistent with *Scott*, we conclude that the district court did not commit clear error in determining that the FBI's minimization efforts were objectively reasonable.

B. Choice of Counsel

Fred Goodson argues that the district court erred in denying, on grounds of conflict, his motion to associate Michael Fawer as additional counsel.[11] Goodson complains that the district court's ruling constitutes error in

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[11] Michael Fawer represented Goodson's co-defendant, former Louisiana State Senator Rayburn, through the investigative stage of this case. Fawer assisted Rayburn in responding to three grand jury subpoenas, had discussions with the Government regarding the nature of the charges being considered against Rayburn, and appeared in court on behalf of Rayburn at the initial appearance, as well as later to argue motions.

On November 5, 1996, Fawer withdrew as counsel for Rayburn, and Arthur A. Lemann, III replaced Fawer as counsel for Rayburn. On February 24, 1997, Goodson moved the district court to associate Fawer as additional counsel for him.

light of both his and Rayburn's knowing waiver of any conflict of interest and the sworn statements averring unawareness of any actual or potential conflict of interest submitted by Michele Fournet (counsel for Goodson), Michael Fawer, and Arthur Lemann.

We review a district court's finding of a conflict of interest for abuse of discretion. *See United States v. Sotelo*, 97 F.3d 782, 791 (5th Cir.1996). Although a district court must "recognize a presumption in favor of petitioner's counsel of choice," "that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Wheat v. United States*, 486 U.S. 153, 164, 108 S.Ct. 1692, 1700, 100 L.Ed.2d 140 (1988). This is true even where a defendant expresses a desire to waive the potential conflict. *See Sotelo*, 97 F.3d at 791.

The crux of Goodson's argument is that the district court's veto of his choice of counsel without finding any "special circumstances" beyond the fact of multiple representation amounts to a per se rule that multiple representation would never be permissible. Goodson contends that such a per se rule contravenes Supreme Court and Fifth Circuit precedent that has recognized the advantages of common defenses. Goodson additionally argues that the four potential areas of conflict elucidated by the district court exist in every case of multiple representation and that appellate courts have regularly found that conflicts do not arise in those contexts.[12]

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[12] The district court outlined four areas of potential conflict: (1) because a plea by Goodson would be adverse to

Goodson's argument is flawed. First, the district court in no way established a per se rule against joint representation. The district court applied the Sixth Amendment and the Supreme Court's *Wheat* analysis to the facts developed at the hearing before the magistrate judge. On the basis of those facts, the district court concluded that institutional interests and interests of the defendant warranted a denial of Goodson's motion to associate Fawer. Second, neither the Supreme Court nor this Circuit has adopted a "special circumstances" test for determinations of conflict in joint representation. Although the Supreme Court's 1980 *Cuyler* decision does include "special circumstances" language, it does so only in discussing when a state court, sua sponte, needs to "initiate inquiries into the propriety of multiple representation." *Cuyler v. Sullivan*, 446 U.S. 335, 346, 100 S.Ct. 1708, 1717, 64 L.Ed.2d 333 (1980). Third, the cases upon which Goodson relies to show that joint representation is permissible despite possible conflicts of interest involve claims of ineffective assistance of counsel. In those cases, the courts employed a retrospective, record-based inquiry in order to determine whether an attorney was operating under a conflict of interest. Their findings of "no conflict" are of limited usefulness here, where the district court

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Rayburn's interests, Fawer would have a conflict in advising Goodson regarding plea negotiations; (2) evidence could develop at trial that pitted one defendant's interest against the other's; (3) Goodson's and Rayburn's interests could diverge at sentencing, over issues such as their respective roles in the offense; and (4) because Fawer received confidences from Rayburn, Fawer's cross-examination of Rayburn would be problematic.

predicated its denial of the motion to associate counsel on a finding of serious *potential* conflict. Goodson fails to appreciate the distinction between a retrospective inquiry of actual conflict and a prospective inquiry into serious potential conflict.

The evaluation of the facts and circumstances of each case under the *Wheat* standard "must be left primarily to the informed judgment of the trial court." *Wheat*, 486 U.S. at 164, 108 S.Ct. at 1700. The district court made specific findings as to four potential areas of serious conflict. We find that the district court did not abuse its discretion in denying Goodson's motion to associate Fawer.

C. Louisiana Video Poker License as "Property"

Maria Goodson and Attorney Cleveland assert that a Louisiana video poker license is not "property" for purposes of the mail fraud statute, 18 U.S.C. § 1341. Less than two years ago, we reached a contrary conclusion in *United States v. Salvatore*, 110 F.3d 1131 (5th Cir.1997). Bound by our prior decision, we do not revisit this issue.

D. Fair Notice

Maria Goodson and Cleveland argue that, at the time of their mail fraud offenses, they did not have fair notice that the acts charged were crimes. They claim that they did not have notice (1) that unissued video poker licenses constituted property under the mail fraud statute, and (2) that certain information needed to be reported to the Louisiana State Police on the video poker license applications. We find these arguments devoid of merit.

"The test of whether a statute is unconstitutionally vague so as to deprive fair notice is whether it provides a person of ordinary intelligence a reasonable opportunity to know what is proscribed." *United States v. Brewer,* 835 F.2d 550, 553 (5th Cir.1987). With regard to the first claim, we note that, at the time of the charged conduct, a circuit split existed as to whether or not unissued licenses constituted property for purposes of the mail fraud statute. Although we had not yet ruled on the issue, at least two circuits had found that unissued licenses are property for mail fraud purposes. Accordingly, we conclude that, assuming each to be of ordinary intelligence, Maria Goodson and Cleveland had reasonable opportunity to know that their conduct could be proscribed by the mail fraud statute. *Cf. United States v. Brumley,* 116 F.3d 728, 732 (5th Cir.1997) (en banc) ("Constructions of a statute announced by the Supreme Court or lower courts can give citizens fair warning, even if the cases are not fundamentally similar." (quotation marks omitted)).

We are equally unpersuaded by Maria Goodson and Cleveland's claim that they did not have fair notice that the Louisiana State Police required disclosure of indefinite and contingent plans to acquire an equity interest in a video poker licensee at some unspecified time in the future, or an ownership or other interest in a licensee of less than five percent. The "Affidavit of Full Disclosure" that accompanied the initial and renewal applications explicitly required that video poker applicants be the "sole beneficial owner of any direct or indirect interest in or to a licensed gaming operation . . . except such as having been reported in writing to the Louisiana State Police." The affidavit required that applicants attest that

they had (1) "no agreements or understandings with any other person and no present intent to hold as agent, nominee, associate, third party or otherwise any direct or indirect interest whatsoever in or to the licensed gaming operation" and (2) "no agreements or understandings with any other person and no present intent to transfer at any future time any interest whatsoever. . . . " We find that this language provided a person of ordinary intelligence adequate notice that ownership interests in any amount must be disclosed to the Louisiana State Police. Similarly, we find the "agreement or understanding" language sufficiently broad to include indefinite and contingent plans to acquire equity interests at some unspecified future time. We therefore conclude that Maria Goodson and Cleveland had fair notice.

E. State Law "Ownership" Jury Instructions

Cleveland, Fred Goodson, and Maria Goodson claim that the district court erred in refusing to charge the jury concerning certain state-law concepts of ownership. The district court refused to give the requested instructions because, *inter alia*, the state-law concepts did "not go to the guilt or innocence of the defendants." We review a district court's refusal to provide a requested instruction for abuse of discretion. *See United States v. Pennington*, 20 F.3d 593, 599 (5th Cir.1994). Although we have recognized the importance of instructing on legal concepts significant to a theory of defense, *see, e.g., United States v. Cavin*, 39 F.3d 1299, 1310 (5th Cir.1994) (reversing a conviction because the court failed to instruct on state ethical rules relevant to an attorney's theory of defense), we have

never required that a district court instruct a jury on peripheral concepts that do not directly implicate an essential element of the charged offense.

Cleveland argues that the ownership instructions were directly relevant to both his guilt or innocence and that of Fred and Maria Goodson. According to Cleveland, the critical issue to be decided by the jury was whether TSG, Ltd.'s license applications contained "fraudulent representations or omissions," that is, whether in keeping with the Government's theory of the case, the mailed video poker license applications failed to disclose hidden interests of Fred Goodson and Carl Cleveland in TSG, Ltd., as owners, option holders, or pledge recipients.[13] Cleveland contends that the jury could not fairly decide who owned TSG, Ltd. without knowing whether Goodson or Cleveland had enforceable ownership interests under state law.

We disagree. The jury was instructed to find whether the video poker license applications were fraudulent in so far as affidavits submitted by Maria and Alex Goodson failed to mention any (1) agreements or understandings with any other persons to hold their interests as a nominee, agent or otherwise, and/or (2) agreements or understandings with any other person and a present intent to

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[13] The district court instructed the jury that an essential element of mail fraud – distinct from specific intent – is that a defendant knowingly created a scheme to defraud. Such a scheme, according to the district court's instructions, must involve false or fraudulent representations or omission reasonably calculated to deceive persons of ordinary prudence and comprehension.

transfer at any future time any interest whatsoever in TSG, Ltd. Whether the "agreements or understandings" were enforceable under state law is not relevant to the question of whether Maria and Alex Goodson failed to disclose such arrangements to the Louisiana State Police. Accordingly, we find that the district court did not abuse its discretion in refusing to charge the jury as requested by Appellants. *See Pennington*, 20 F.3d at 600 (explaining that reversal is warranted only if the requested instruction (1) was a substantially correct statement of the law, (2) was not substantially covered in the charge as a whole, and (3) concerned an important issue in the trial).

Fred Goodson, Maria Goodson, and Cleveland also challenge the district court's supplemental instruction to the jury. In particular, they contend that the district court erred in giving a supplemental instruction that ignored state-law ownership principles and embraced the Government's theory that ownership could be determined simply from informal discussions.

After deliberations began, the jury sought clarification of three issues: (1) the legal definition of a partnership *in commendam*, (2) how much control is given up by partners, and (3) who appoints a general manager. In response, the district court provided the jury a general description of a partnership *in commendam* and the authority of the general and limited partners. The court concluded its supplemental instruction by charging the jury, over defense objections: "It is for you to determine based on all the evidence in the case what the parties' arrangements were as to control, ownership and management of Truck Stop Gaming, Ltd."

We find no reversible error.

> A trial judge enjoys wide latitude in deciding how to respond to a question from the jury. "When evaluating the adequacy of supplemental jury instructions, we ask whether the court's answer was reasonably responsive to the jury's question and whether the original and supplemental instructions as a whole allowed the jury to understand the issue presented to it."

United States v. Mann, 161 F.3d 840, 864 (5th Cir.1998) (footnotes omitted) (quoting *United States v. Stevens*, 38 F.3d 167, 170 (5th Cir.1994)). In this case, the court's supplemental instruction was reasonably responsive to the jury's questions. Moreover, as mentioned above, satisfaction of state law requirements for ownership transfers was not a critical issue to be decided by the jury.

F. Travel Act Jury Instructions

Bankston was convicted on two Travel Act counts, which incorporated Louisiana's public bribery statute. He argues that his conviction ought to be reversed because the district court abused its discretion in failing to submit to the jury proposed charges on gift, attempted bribery, and circumstantial evidence.

First, Bankston asserts that he was entitled to an instruction that it is legal for a legislator to receive a gift. Such an instruction, however, was unnecessary given the district court's charge that the Government had to prove beyond a reasonable doubt that Bankston, as the receiver of the bribe, acted "with the specific intent to be influenced in his conduct . . . as a Louisiana senator." Whether

Bankston could lawfully receive a gift was wholly irrelevant to the jury's inquiry. Because the district court's Travel Act instruction was clear, detailed, and substantially covered the charge suggested by Bankston, the court's refusal to instruct on gift does not amount to error.

Second, Bankston, complains that the district court refused to instruct the jury on the lesser included offense of attempted bribery under Louisiana law. He argues that, in Louisiana, such an instruction is not discretionary and that, had the jury found only attempted bribery, the elements of the Travel Act charge would not have been met. In federal prosecutions for violations of the Travel Act, we have never required that district courts instruct on lesser included offenses. Accordingly, we find Bankston's argument to be devoid of merit.

Third, Bankston argues that the district court committed reversible error by failing to instruct on Louisiana's "circumstantial evidence rule." Because we have squarely rejected efforts to graft non-substantive points of state law into RICO charges, Bankston's claim fails. *See, e.g., United States v. Brown*, 555 F.2d 407, 418 n. 22 (5th Cir.1977) (explaining that " 'the reference to state law in the federal statute is for the purpose of defining the conduct prohibited' and is not meant to incorporate the state statute of limitations or procedural rules" (quoting *United States v. Revel*, 493 F.2d 1, 3 (5th Cir.1974))).

G. Witness Testimony

Cleveland, Fred Goodson, and Maria Goodson claim that the Government elicited improper witness testimony

from two law enforcement officials, FBI Special Agent Gross and State Police Lieutenant Blackwelder. They launch four attacks on Gross and Blackwelder's testimony: (1) that both witnesses testified to legal conclusions, (2) that both witnesses gave testimony in the form of opinion, (3) that both witnesses testified as to "ultimate issue[s] of fact," and (4) that Gross's testimony exceeded his limited "summary" capacity. Evidentiary rulings are reviewed for abuse of discretion. *See General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997).

We find that the district court did not abuse its discretion in permitting the challenged testimony. Because neither Gross nor Blackwelder was designated as an expert witness, most of the caselaw that Cleveland cites for the proposition that a witness cannot testify in the form of an opinion is inapplicable. Unlike expert witnesses, lay persons are allowed more leeway under the Federal Rules in testifying in the form of opinions. *See* Fed.R.Evid. 701. Lay persons are explicitly allowed to testify in the form of opinion or inference on "ultimate issue[s] to be decided by the trier of fact." Fed.R.Evid. 704. Additionally, witnesses can testify in more than one capacity. *See United States v. Castillo*, 77 F.3d 1480, 1499 (5th Cir.1996) (noting that a summary witness could testify in multiple capacities). Accordingly, Special Agent Gross could have testified as a lay fact witness as well as a summary witness. Having reviewed both Agent Gross's and Lieutenant Blackwelder's testimony, we find no reversible error.

H. Magazine Article Admission

Fred Goodson, Carl Cleveland, and Bankston challenge the district court's admission of a magazine article titled "Lies, Bribes and Videotape," found in the FBI's search of Fred Goodson's office. The district court admitted the article during redirect examination of FBI Special Agent Gross and instructed the jury that the article was being admitted not for the truth of the matter asserted, but solely on the issue of the state of mind of Fred Goodson, i.e., to contradict his assertions that he lacked knowledge and sophistication about politics and the types of transactions at issue. Evidentiary rulings are accorded considerable deference on appeal; "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Fed.R.Evid. 103(a); *see United States v. Brito*, 136 F.3d 397, 412 (5th Cir.1998).

Fred Goodson and Cleveland contest the admissibility of the article both as to relevance and as to prejudicial effect. Even were the article both irrelevant and prejudicial, however, its admission did not affect a substantial right of either Goodson, Cleveland, or Bankston. First, the district court did not allow introduction of the article by the Government until redirect examination. Second, the district court permitted only "narrow clarifying" references to the article in light of the defense's introduction, on cross examination, of other documents etc. that had been found in the same folder as the "Lies, Bribes and Video Tape" article. Third, the Government's redirect regarding the disputed article constituted less than four pages of transcript. Fourth, on recross, the defense had the opportunity to question Agent Gross in

detail about the subject matter of the article and elicited from him representations that the investigation described in the article in no way involved "anybody in this room."

For these reasons, we find that the admission of the "Lies, Bribes and Video Tape" article did not affect a substantial right of any appellant.

I. Prosecutor's Closing Remarks

All appellants claim that in his rebuttal argument the prosecutor made improper and inflammatory remarks, inviting the jury to convict the defendants in order to "make a change" and to "start taking back [their] state." Appellants argue that the district court's subsequent instruction failed to cure the taint of the improper closing and that reversal is therefore required.[14]

A criminal defendant bears a substantial burden when attempting to demonstrate that improper prosecutorial comments constitute reversible error. " 'A criminal conviction is not to be lightly overturned on the basis

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[14] The district court, both at trial and in its opinion on defendants' motions for new trial, recognized the impropriety of the prosecutor's "make a change" closing. At the conclusion of the prosecutor's argument, the court instructed the jury to disregard the prosecutor's improper remarks:

> I would like to instruct you again that this case is not about the general conditions in the state of Louisiana. To the extent that Mr. Manger made reference to that in his closing argument, you are instructed to disregard the comments about the general condition of Louisiana state government as it relates to education or other issues.

of a prosecutor's comments standing alone.' " *United States v. Lowenberg*, 853 F.2d 295, 302 (5th Cir.1988) (quoting *United States v. Young*, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044, 84 L.Ed.2d 1 (1985)). Improper prosecutorial comments require reversal only if the comments substantially affected the defendant's right to a fair trial. *See United States v. Murrah*, 888 F.2d 24, 27 (5th Cir.1989). In evaluating the extent to which prosecutorial comments affected a defendant's right to a fair trial, three factors are considered: the magnitude of the prejudicial effect of the remarks, the efficacy of any cautionary instruction, and the strength of the evidence of the defendant's guilt. *See United States v. Casel*, 995 F.2d 1299, 1308 (5th Cir.1993).

Here, the inflammatory remarks, to which defense counsel objected at trial, came at the end of the prosecutor's rebuttal argument. The improper prosecutorial comments responded to improper arguments made by counsel for Rayburn. Any prejudicial effect inhering to the Goodsons, Bankston, and/or Cleveland, it seems, would have been substantially less than that attaching to Rayburn. Rayburn's acquittal therefore suggests that the jury was not influenced by the improper comments.[15]

With regard to the efficacy of the district court's instruction, the court more than once instructed the jury to disregard the improper arguments. The language the

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[15] Appellants argue that Rayburn's "sympathy" acquittal is of little significance because he was 80 years old at the time of the trial. Rayburn, however, was not the only defendant acquitted of charges. The fact that each appellant was found not guilty on some counts suggests that the jury reached its verdict free of the taint of the prosecutor's improper remarks.

court adopted when instructing the jury for the second time was in part borrowed from the words of Bankston's attorney. We find sufficiently curative both the district court's repeated instruction to disregard the improper argument as well as its caution to the jury that lawyer argument was not evidence.

Finally, as to the strength of the evidence of guilt, our review of the trial record in its entirety reveals that the evidence presented by the Government was sufficient to support each of the convictions against each of the appellants. Thus, we conclude that the prosecutorial comments did not substantially affect the Goodsons', Cleveland's, or Bankston's respective rights to a fair trial.

J. Sufficiency of the Evidence

Fred Goodson, Maria Goodson, and Larry Bankston contest the sufficiency of the evidence to support their respective convictions. In evaluating the sufficiency of the evidence on appeal, we consider the evidence in the light most favorable to the Government, drawing all reasonable inferences in support of the jury's verdict. *See United States v. Lopez*, 74 F.3d 575, 577 (5th Cir.1996). The evidence is sufficient if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v. Gaytan*, 74 F.3d 545, 555 (5th Cir.1996). The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence. *See Lopez*, 74 F.3d at 577.

We address the arguments raised by each appellant in turn.

1. Fred Goodson

Fred Goodson argues that the evidence is insufficient to support his two-count conviction for mail fraud because it fails to establish that he had the specific intent to commit fraud.

To establish a mail fraud violation under 18 U.S.C. § 1341, the Government must demonstrate (1) a scheme to defraud, (2) the use of mails to execute that scheme, and (3) the defendant's specific intent to commit fraud. *See United States v. Tencer*, 107 F.3d 1120, 1125 (5th Cir.1997). "Intent to defraud requires an intent to (1) deceive, and (2) cause some harm to result from the deceit." *United States v. Jimenez*, 77 F.3d 95, 97 (5th Cir.1996). A defendant has the intent to defraud if he acts knowingly with the specific intent to deceive for the purpose of causing pecuniary "loss to another or bringing about some financial gain to himself." *United States v. Blocker*, 104 F.3d 720, 732 (5th Cir.1997).

According to Goodson, the mail fraud charges rested on two premises: that he and Cleveland were the "true owners" of Truck Stop Gaming, and that they hid that fact from regulators in order to avoid a suitability investigation of their finances. Goodson, on appeal, contests the sufficiency of the evidence only as it relates to the second premise – Goodson and Cleveland's avoidance of a suitability investigation.

This second premise, however, does not constitute an essential element of mail fraud. Instead, the desire to avoid a suitability investigation relates merely to motive, representing the Government's theory as to why Cleveland and Goodson committed the fraud. Because we have never required the Government to prove nor the jury to find motive beyond a reasonable doubt, Fred Goodson's argument fails.

2. Maria Goodson

Maria Goodson challenges the sufficiency of the evidence for her mail fraud conviction. She claims that the Government failed to establish that she knowingly, and with specific intent to defraud, participated in a scheme to hide either (1) the true ownership interests of her father and Carl Cleveland in TSG, Ltd. or (2) the 4.99% ownership interest held by Benny Rayburn, Jr.

Because the jury need only have found Maria Goodson guilty beyond a reasonable doubt on one of the two potential schemes underlying her mail fraud conviction, we address only the evidence concerning Maria Goodson's specific intent to conceal the 4.99% ownership interest transferred to Benny Rayburn. The Government presented the jury with a document dated August 1, 1994, signed by Maria Goodson in which she agreed to "assign, sell, convey and deliver unto Benjamin B. Rayburn, Jr. a 4.99% interest out of a 100% interest in the Truck Stop Gaming, Ltd. partnership." Evidence showed that the transfer of this interest was not reported to the State Police in TSG, Ltd.'s 1995 license renewal application,

even though such minority purchases were required to be reported.

Maria Goodson's awareness of the transfer of ownership is indicated by two pieces of evidence. First, she signed the conveyance itself. Second, in a recorded conversation between Maria Goodson and family accountant Joe Morgan, she described BAJ, LLC, the limited liability company to which Rayburn ultimately transferred his 4.99% interest, as having become a 4.9% partner. Accordingly, we find that the jury had sufficient evidence to convict Maria Goodson for mail fraud.

3. Larry Bankston

Larry Bankston contests the sufficiency of the evidence as to his conviction on two counts of violating the Travel Act, 18 U.S.C. § 1952 (1997). The first count involved an interstate telephone call on June 20, 1995, from Fred Goodson to Meyer Realty to set up what was alleged to have been a bribe in the form of a "sham" rental of Bankston and his wife's Gulf Shores condominium. The second involved Fred Goodson's use of an interstate commercial carrier on June 22, 1995, to forward a $1,555.01 check to Meyer Realty as payment for the condominium rental.

The essential elements for a Travel Act conviction are:

> (1) travel or use of the mail or any facility in interstate or foreign commerce;
>
> (2) with the specific intent to promote, manage, establish, or carry on – or distribute the proceeds of – unlawful activity; and

> (3) knowing and willful commission of an act in furtherance of that intent subsequent to the act of travel or use of the mail or facility of interstate or foreign commerce.

See United States v. Logan, 949 F.2d 1370, 1380-81 (5th Cir.1991). Under Louisiana law, an elected official is guilty of public bribery if he accepts anything of apparent present or prospective value with the specific intent to be influenced in his employment, position, or duty. *See* La.Rev.Stat. Ann. § 14:118 (West Supp.1999).

Bankston attacks the sufficiency of the evidence on three separate grounds: (1) insufficient proof that he had the requisite intent to be influenced in his official conduct by the condominium rental; (2) insufficient proof that the condominium rental amounted to anything more than a legal gift; and (3) insufficient proof that he committed an overt act in furtherance of the alleged bribery after the interstate communications at issue.

The evidence at trial does not support Bankston's claim. The evidence showed that in February 1995 Bankston and his wife discussed establishing an arrangement whereby a proposed "renter" would pay to use their Alabama condominium despite the renter's true intention not to do so. Records from Meyer Realty showed that Fred Goodson rented the Bankstons' condominium and paid for the rental by check. Testimony from FBI agents revealed that the Bankston family, not Goodson, used the condominium during the rental week in question. Finally, the jury heard many intercepted conversations between Bankston and others in which Bankston indicated that he would use the power of his office to protect Goodson's video poker interests during the legislative session. Based

upon this evidence, we affirm Bankston's conviction on the two Travel Act counts.

K. Sentencing

1. Maria Goodson

a. Section 5K2.7 Upward Departure

Maria Goodson complains that the district court improperly enhanced her offense level six points for a "significant disruption of governmental function," pursuant to U.S. Sentencing Guideline section 5K2.7.[16] She argues that the disruption identified by the district court is not the type of "significant" disruption that the Commission contemplated when drafting section 5K2.7 and that, although the submission to a state agency of one false application may disrupt the agency's function, it only does so in an "ordinary" sense. We disagree.

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[16] Section 5K2.7 provides in part:

> If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

A district court has "wide discretion" in imposing a section 5K2.7 upward departure. *United States v. Hatch*, 926 F.2d 387, 397 (5th Cir.1991) (explaining that the Fifth Circuit has repeatedly granted district courts "wide discretion to decide whether aggravating factors exist to support an upward departure"). The appropriateness of a departure turns on the importance of the government function impacted, not the degree of the impact. *Cf. Hatch*, 926 F.2d 387 (affirming a 5K2.7 upward departure based on the defendant, a former Louisiana sheriff, authorizing payments, representing a portion of the sheriff office's operating budget, to a purported jail construction project consultant); *United States v. Garcia*, 900 F.2d 45 (5th Cir.1990) (holding that an upward departure was warranted and reasonable where postal inspectors recovered 248 first-class letters from the possession of a defendant postal employee). Here, when Maria Goodson submitted TSG, Ltd.'s false 1995 renewal application, failing to disclose any ownership interest held by Fred Goodson, Carl Cleveland, or Benny Rayburn, she effectively shielded those men from suitability analysis. In doing so, Maria Goodson thwarted Louisiana's video poker regulatory and licensing scheme designed to investigate the honesty and integrity of prospective license holders. Based upon the importance of that regulatory scheme, we find that the district court did not abuse its discretion in imposing a section 5K2.7 upward departure.

b. Loss Calculation

The Government, in its cross-appeal, contends that the district court miscalculated Maria Goodson's offense level. Maria Goodson was convicted of one count of mail

fraud in connection with TSG, Ltd.'s 1995 license renewal application. The district court sentenced her in accordance with section 2F1.1 of the Sentencing Guidelines. That section specifies a base offense level of six for fraud and provides for incremental increases in the offense level depending on, *inter alia*, the amount of loss caused by the fraud. *See* U.S. Sentencing Guidelines Manual § 2F1.1 (1997). In calculating Maria Goodson's offense level, the court found that the State of Louisiana had suffered no "actual or intended monetizable loss . . . by virtue of Ms. Goodson's having fraudulently obtained the license." Accordingly, the district court did not increase Ms. Goodson's base offense level for any loss.

The Government asserts that the district court erred in finding that the State of Louisiana suffered no loss and in failing to use defendant's gain as an alternative method of valuation. The Government asserts that, in keeping with section 2F1.1's Application Note 8, Maria Goodson's base offense level should have been increased eleven levels based upon TSG, Ltd.'s $1.4 million annual gain. *See* U.S. Sentencing Guidelines Manual § 2F1.1 App. Note 8 (1997); *see also United States v. Smithson*, 49 F.3d 138, 144 (5th Cir.1995) (recognizing that under section 2F1.1, Application Note 8, a sentencing court may utilize the offender's gain as an alternative valuation method for assessing the amount of loss when the loss is difficult to determine).

In its sentencing cross-appeal, the Government urges use of TSG, Ltd.'s $1.4 million annual revenues as the appropriate valuation of Maria Goodson's gain, yet throughout trial and all subsequent forfeiture proceedings, the Government argued that Maria Goodson, in fact,

was not the "true owner" of TSG, Ltd. The verdict of the jury as well as the district court's judgment of forfeiture confirmed the success of the Government's hidden ownership theory of prosecution. Accordingly, we consider Fred Goodson and Carl Cleveland the true owners of TSG, Ltd. and agree that TSG, Ltd.'s $1.4 million gain could not be attributed to Maria Goodson, a non-owner. Therefore, the district court did not err in refusing to use TSG, Ltd.'s $1.4 million annual revenues as an alternative valuation method for loss pursuant to section 2F1.1.

2. Bankston

a. Eleven-level Enhancement

Bankston challenges as unsupported by the evidence the district court's eleven-level increase in his base offense level under section 2C1.1(b)(2)(A). This Court examines a district court's factual findings only for clear error and affords great deference to the court's application of the Guidelines to those facts. *See United States v. Snell*, 152 F.3d 345, 346 (5th Cir.1998).

The district court, relying on the Presentence Report ("PSR") as well as facts elicited at trial and the forfeiture proceeding, based Bankston's offense level enhancement on its calculation of the "expected benefit to be received by the individual paying the bribe," namely Fred Goodson.[17] The district court found that the benefit to be

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[17] The Cuidelines assign punishment at the greatest of three calculations: (1) the value of the bribe; (2) the value of the benefit to be received; or (3) if the offense involved payment for the purpose of influencing an elected official, an eight-level increase. *See* U.S. Sentencing Guidelines Manual § 2C1.1 (1997).

received by Goodson in return for the bribe was protection for a two-year period from legislation that would otherwise interfere with the continued operation of his video poker business. The district court, recognizing that evidence at trial supported a finding that Goodson held a 50% interest in TSG, Ltd., determined that the expected benefit to be received by Goodson was one-half the profits to TSG, Ltd. for a two-year period, or $1.4 million. We find the district court's "Reasons for Sentencing of Larry S. Bankston" to be thorough and well-reasoned. Bankston's assertion of error is meritless.

b. Expected Benefit

The Government, on cross-appeal, argues that the district court erroneously reduced the expected benefit to be received for the bribe to the ownership percentage in TSG, Ltd. of the briber, Fred Goodson. Specifically, the Government contends that the district court erred in limiting "benefit" as used in section 2C1.1(b)(2)(A) to "personal benefit," failing to consider the actual benefit sought, the continued unfettered operation of the RICO enterprise. The issue raised by the Government is one of first impression for this Circuit.

It is well established that sentencing courts are bound by "commentary in the Guidelines Manual that interprets or explains a guideline . . . unless it violates the Constitution or a federal statute, or is inconsistent with, or [is] a plainly erroneous reading of, that guideline." *See Stinson v. United States*, 508 U.S. 36, 38, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993). The Commentary to section 2C1.1 states that for deterrent purposes, the punishment

should be commensurate with the "gain to the payer or the recipient of the bribe," whichever is higher. As contemplated by the Commission, the "gain to the payer" is the "value of the benefit received or to be received." Thus, the expected benefit to be received as referenced in section 2C1.1 is the benefit to the payer of the bribe.

Resolution of the Government's cross-appeal, therefore, turns on the identity of the "payer." If Fred Goodson, in his individual capacity, bribed Bankston, then the district court properly limited "expected benefit" to an amount equivalent to Goodson's personal benefit. If, on the other hand, Fred Goodson, as agent for TSG, Ltd., bribed Bankston, then the Government would be correct that the expected benefit ought to be measured by the profits to the RICO enterprise.

The issue of the identity of the payer is a question of fact best resolved by the district court. Because the evidence presented at trial could support either the individual-capacity or RICO-enterprise theory of bribery, we cannot conclude that the district court committed clear error in determining that the personal benefit to Goodson was the appropriate valuation of the expected benefit to be received.

L. RICO Forfeiture

A person who violates RICO must forfeit any interest acquired or maintained in violation of the statute, any enterprise established or conducted in violation of RICO, and any property constituting or derived from proceeds obtained in violation of RICO. *See* 18 U.S.C. § 1963(a). Here, the Government sought, and the district court

ordered, the forfeiture of both Fred Goodson's and Carl Cleveland's interests in TSG, Ltd., in an amount equal to the proceeds received by TSG, Ltd. between July 1994 and August 1995. Fred Goodson, Carl Cleveland,[18] Maria Goodson, Alex Goodson, and TSG, Inc. appeal, albeit on different grounds, the district court's judgment of forfeiture.

With regard to Fred Goodson's and Carl Cleveland's claim, we note that the district court ordered that the proceeds of TSG, Ltd. be forfeited pursuant to 18 U.S.C. § 1963(a)(1) and (a)(2), as well as (a)(3). Goodson, though, attacks only two of these three grounds. He raises no error as to the forfeiture of proceeds under § 1963(a)(3). Given the identity of proceeds forfeited pursuant to each theory, we affirm the district court's August 1997, forfeiture order.

Maria Goodson, Alex Goodson, and TSG, Inc. argue that the district court erred in failing properly to apply Louisiana law to the question of ownership of TSG, Ltd. and TSG, Inc. They assert that no state law exists that would support the district court's ruling that Fred Goodson and Carl Cleveland were the "true owners" of TSG, Ltd.

Section 1963(*l*)(6)(A) provides petitioners the opportunity to recoup forfeited property if they can establish by a preponderance of the evidence either (1) that they have a current legal right, title, or interest in the property *and* that the right, title, or interest was vested in them

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[18] Carl Cleveland incorporates Fred Goodson's forfeiture arguments.

instead of the defendant at the time of the commission of the RICO offenses; or (2) that they have a current legal right, title, or interest in the property *and* that the right, title, or interest was superior to the right, title, or interest of the defendant at the time of the commission of the RICO offenses. *See* 18 U.S.C. § 1963(*l*)(6)(A). We review the district court's findings of fact under the clearly erroneous standard and the question of whether those facts constitute legally proper forfeiture de novo. *See United States v. Marmolejo*, 89 F.3d 1185, 1197 (5th Cir.1996).

Maria and Alex Goodson assert that they are the record owners of TSG, Ltd. and its corporate general partner, TSG, Inc. They point to TSG, Ltd.'s Agreement of Partnership, which they both signed and which was filed with the Louisiana Secretary of State, as evidence of their current and superior interest in the forfeited companies. They urge us to find that the district court improperly disregarded their partnership agreement when it concluded that Fred Goodson and Carl Cleveland were the true owners of TSG, Ltd.

We agree with the district court's decision not to allow an obviously false partnership agreement to be used to provide the basis for a claim of interest under § 1963(*l*)(6)(A). As the district court indicated, the jury's verdict in the instant case established that Fred Goodson, Maria Goodson, and Carl Cleveland perpetrated a fraud on the State of Louisiana. The jury necessarily found that Fred Goodson and Carl Cleveland were the true owners of TSG, Ltd. and that Maria Goodson and her brother Alex were straw people used in the sham to hide the true ownership of TSG, Ltd.

Testimony at the October 31, 1997 evidentiary hearing to determine the interests of Alex and Maria Goodson bolsters our resolve not to allow them to assert ownership in the TSG entities based upon their "sham" partnership agreement. With regard to Alex Goodson, the district court found that his hearing testimony revealed that he did not consider himself to have any real interest in either TSG, Inc. or TSG, Ltd. Alex described his involvement with the companies as someone executing an ownership document as an agent of the company, in the capacity of a nominee. His testimony revealed that he had no understanding of the "contribution" that was attributed to him in the partnership agreement for TSG, Ltd. As to Maria Goodson, the court found that her testimony likewise "fell short of establishing that she and her brother . . . were the true owners of the Truck Stop Gaming entities." In particular, Maria Goodson told the court at the forfeiture hearing that at the time the companies were formed and incorporated, she did not associate a company being "in her name" with ownership. Equally problematic was a conversation with Carl Cleveland in which she requested 1% of the net profits of TSG, Ltd. If she had in fact been the owner of the TSG entities, she would not have needed to ask Carl Cleveland for an interest in a percentage of the companies' profits.

In light of the above evidence, the district court properly disregarded the "sham" partnership agreement. Consistent with the detailed analysis provided in the district court's April 1998 order, we conclude that Alex Goodson, Maria Goodson, and TSG, Inc. failed to demonstrate by a preponderance of the evidence a legal right, title, or

interest in TSG, Ltd. Their appeal of the district court's April 1998 judgment of forfeiture, therefore, fails.

III. Conclusion

Appellants raise an abundance of evidentiary, statutory, and constitutional challenges, none of which warrant reversal. For the reasons stated above, we affirm each Appellant's judgment of conviction and sentence as well as the judgment of forfeiture.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-31057

UNITED STATES OF AMERICA

Plaintiff –
Appellee-Cross-Appellant

v.

LARRY S BANKSTON; MARIA F GOODSON

Defendants –
Appellants-Cross-Appellees

CARL W CLEVELAND; FRED H GOODSON

Defendants – Appellants

Cons/w No. 98-30471

UNITED STATES OF AMERICA

Plaintiffs – Appellee

v.

MARIA F GOODSON

Defendant – Appellant

ALEXANDROS F GOODSON; TRUCK STOP GAMING LTD

Intervenors – Appellants

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITIONS FOR REHEARING AND REHEARING EN BANC

(Opinion 7/21/99, 5 Cir., ___, ___ F.3d ___)

(Filed Sept. 2, 1999)

Before KING, Chief Judge, and REAVLEY and BENAVIDES, Ciruict [sic] Judges.

PER CURIAM

(✓) The Petitions for Rehearing on behalf of Larry Bankston, Fred H Goodson and Carl W Cleveland are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc on behalf of Fred H Goodson, Carl W Cleveland and Maria F Goodson is also DENIED.

( ) The Petitions for Rehearing on behalf of Larry Bankston, Fred H Goodson and Carl W Cleveland are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor. (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc on behalf of Fred H Goodson, Carl W Cleveland and Maria F Goodson is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en

banc, and a majority of the judges in active service not having voted in favor, the Petition for Rehearing En Banc on behalf of Fred H Goodson, Carl W Cleveland and Maria F Goodson is DENIED.

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-31057

UNITED STATES OF AMERICA

Plaintiff –
Appellee-Cross-Appellant

v.

LARRY S BANKSTON; MARIA F GOODSON

Defendants –
Appellants-Cross-Appellees

CARL W CLEVELAND; FRED H GOODSON

Defendants – Appellants

No. 98-30471

UNITED STATES OF AMERICA

Plaintiffs – Appellee

v.

MARIA F GOODSON

Defendant – Appellant

ALEXANDROS F GOODSON; TRUCK STOP GAMING LTD

Intervenors – Appellants

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING

(Filed Sep. 22, 1999)

Before KING, Chief Judge, and REAVLEY and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of appellant-cross-appellee Maria F Goodson, and appellants, Alexandros Goodson and Truck Stop Gaming in the above Case is DENIED.

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-31057

UNITED STATES OF AMERICA

Plaintiff –
Appellee-Cross-Appellant

v.

LARRY S BANKSTON; MARIA F GOODSON

Defendants –
Appellants-Cross-Appellees

CARL W CLEVELAND; FRED H GOODSON

Defendants – Appellants

UNITED STATES OF AMERICA

Plaintiffs – Appellee

v.

MARIA F GOODSON

Defendant – Appellant

ALEXANDROS F GOODSON; TRUCK STOP GAMING LTD

Intervenors – Appellants

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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(Filed Jul. 13, 1999)

ORDER:

IT IS ORDERED that the motion of Appellants, Carl W. Cleveland and Fred H. Goodson, for leave to file a joint supplemental brief, not exceeding 2,500 words, is DENIED.

IT IS FURTHER ORDERED that the request of appellants for leave to file a reply to any response that might be filed by the government, is Dismissed as moot.

/s/ Charles R. Fulbruge III
CHARLES R. FULBRUGE III
CLERK OF COURT

APPENDIX E

UNITED STATES OF AMERICA

v.

CARL W. CLEVELAND, FRED H. GOODSON, MARIA F. GOODSON, JOE H. MORGAN, BENJAMIN BURA RAYBURN, SR. AKA "B.B. SIXTY RAYBURN" AND LARRY S. BANKSTON.

Criminal Action No. 96-207.

UNITED STATES DISTRICT COURT,
E.D. LOUISIANA.

Jan. 14, 1997.

Anthony J. Marabella, Jr., Marabella & Moore, Baton Rouge, LA, for Carl W. Cleveland.

Marilyn Michele Fournet, Baton Rouge, LA, for Fred H. Goodson.

Katherine Wheeler, Steffes & MacMurdo, Baton Rouge, LA, James Michael Small, Law Offices of J. Michael Small, Alexandria, LA, for Maria F. Goodson.

Arthur A. Lemann, III, Arthur A. Lemann & Associates, New Orleans, LA, William R. Campbell, Jr., New Orleans, LA, Michael Seth Fawer, Smith, Jones & Fawer, New Orleans, LA, for Benjamin Bura Rayburn, Sr.

Christopher Mar Guidroz, Simon, Peragine, Smith & Redfearn, LLP, New Orleans, LA, George Shaddock, Pascagoula, MS, for Joe H. Morgan.

Karl J. Koch, Lewis O. Unglesby, Unglesby & Koch, Baton Rouge, LA, for Larry S. Bankston.

Ian Hipwell, U.S. Attorney's Office, Baton Rouge, LA, Robert J. Boitmann, U.S. Attorney's Office, New Orleans, LA, for U.S.

ORDER AND REASONS

VANCE, District Judge.

I. Introduction

This criminal case involves allegedly illegal activity in the video poker industry in Louisiana. The defendants are former Louisiana State Senators Benjamin ("B.B. Sixty") Rayburn and Larry S. Bankston; an attorney, Carl Cleveland; an accountant, Joe H. Morgan; and two alleged video poker entrepreneurs, Fred H. Goodson and his daughter, Maria F. Goodson.

The government charges each of the defendants with racketeering and racketeering conspiracy and charges various defendants with mail fraud, conducting an illegal gambling business, interstate communications in aid of racketeering, conspiracy to defraud the United States, filing of a false income tax return, false declaration under penalty of perjury, aiding and abetting false declaration under penalty of perjury, and money laundering. Defendant Fred Goodson ("Goodson") challenges certain counts of the indictment as predicated on constitutionally infirm criminal statutes and claims that other charges should be dismissed because a video poker license does not constitute the "money or property" needed to support a federal mail fraud conviction. For the reasons stated below, both of Goodson's motions are DENIED.

II. Defendant Fred Goodson's Motion to Dismiss All Illegal Gambling Counts, All Money Laundering Counts, and All Racketeering Acts Predicated on Either Illegal Gambling or Money Laundering Counts

A. Background: Commerce Clause Jurisprudence and *Lopez*

Defendant Fred Goodson moves to dismiss racketeering acts 1e, 2a, 2b, 2c, 2d, 2e, Count 7, and Counts 8 through 12 of the superseding indictment on the grounds that the criminal statutes on which these allegations are based, 18 U.S.C. § 1955 (conducting an illegal gambling enterprise), and 18 U.S.C. § 1956 (money laundering), are facially unconstitutional or, alternatively, that the application of these statutes to this case is unconstitutional in that it constitutes a violation of the Commerce Clause and the Tenth Amendment of the United States Constitution.

It is a fundamental principle of constitutional law that the federal courts are courts of limited jurisdiction and that federal criminal jurisdiction is limited to cases arising under the United States Constitution or federal law. *See* U.S. Const. Art. III, § 2. The Constitution specifically enumerates only five criminal activities.[1] All other federal crimes are the product of Congressional statutes. Congress, however, is not free to pass any criminal statute it deems appropriate. Rather, to pass constitutional

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[1] These enumerated crimes are counterfeiting, U.S. Const. Art. I § 8, cl. 6; piracy on the high seas, U.S. Const. Art. I § 8, cl. 10; treason, U.S. Const. Art III § 3, cl. 2; offenses against the law of nations, U.S. Const. Art. I, § 8, cl. 10; and offenses supporting impeachment, U.S. Const. Art. I § 3, cls. 6 and 7.

muster, all federal criminal statutes must be passed pursuant to one of the specifically enumerated powers in the Constitution. Defendant attacks the constitutional validity of 18 U.S.C. § 1955 (conducting an illegal gambling enterprise) and 18 U.S.C. § 1956 (money laundering) by arguing that neither statute was passed pursuant to a specifically enumerated Congressional power. Defendant maintains that both statutes regulate activity that falls outside the scope of Congress' power to regulate interstate commerce under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3.[2] The Fifth Circuit has already upheld both statutes in question under the Commerce Clause. *See United States v. Gallo*, 927 F.2d 815, 822 (5th Cir.1991) (recognizing the validity of 18 U.S.C. § 1956); *United States v. Harris*, 460 F.2d 1041, 1044 (5th Cir.1972) (upholding 18 U.S.C. § 1955). Defendant nevertheless argues that this Court should reconsider those decisions in light of the United States Supreme Court's recent decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

In *Lopez*, the Supreme Court struck down the Gun Free School Zone Act ("the GFSZA"), a federal statute making it a crime to knowingly possess a firearm in a school zone, on the grounds that it exceeded the authority of Congress under the Commerce Clause. *Lopez* marked the first time since 1936 that the Supreme Court invalidated a federal statute under the Commerce Clause

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[2] The Commerce Clause states that "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . . " U.S. Const. art. I, § 8, cl. 3.

and clearly indicated a shift towards a more restrictive view of Congress' powers under the Commerce Clause than had been espoused in the past.[3]

The *Lopez* Court enumerated three categories of activity that Congress may regulate under its commerce power:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at ___-___, 115 S.Ct. at 1629-30 (internal citations omitted).

The Court found that the GFSZA did not meet either of the first two categories and thus could be upheld only if the statute regulated an activity that "substantially affected interstate commerce." *Id.* In this case, all parties agree that the activities regulated under the statutes in

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[3] For the storied history of the Court's interpretation of the Commerce Clause, *see Lopez*, 514 U.S. ___ ___, 115 S.Ct. 1624, 1626-29; Laurence Tribe, *American Constitutional Law* § 5-4 to 5-7, at 305-13 (2d ed. 1988) (describing initial view that Commerce Clause powers were broad, giving way to a "formalistic" reading of the Commerce Clause, in turn giving way to a "virtually unbounded" reading of the Commerce Clause prior to *Lopez*).

question – illegal gambling and money laundering – clearly do not fall under the first two *Lopez* categories. As in *Lopez*, the Court's Commerce Clause analysis is therefore confined to the third *Lopez* category and the application of the "substantial effects" test. Defendant argues that neither illegal gambling nor money laundering has the requisite "substantial effect" on interstate commerce to permit federal regulation under the Commerce Clause after *Lopez*.

B. Standard of Review

Under *Lopez*, this Court must determine whether a rational basis exists for concluding that the activity to be regulated substantially affected interstate commerce. Chief Justice Rehnquist, in the majority opinion, stated:

> In [*National Labor Relations Board v.] Jones & Laughlin Steel*, [301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893] [(1937)], the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.' (citations omitted). Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.

Lopez, 514 U.S. at ___, 115 S.Ct. at 1629 (citing *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452

U.S. 264, 276-80, 101 S.Ct. 2352, 2360-62, 69 L.Ed.2d 1 (1981)).

Further, although the rational basis test was not new to the Court's Commerce Clause analysis, the Supreme Court applied the test with more rigor in *Lopez* than it had in the past. The *Lopez* Court did not, however, establish precise guidelines for determining whether an activity can be rationally found to have a substantial effect on interstate commerce. Rather, finding that the GFSZA did not regulate activity that substantially affected interstate commerce, the *Lopez* Court found three deficiencies in the statute. First, the GFSZA by its terms "ha[d] nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms" *Lopez*, 514 U.S. at ___-___, 115 S.Ct. at 1630-31. Second, the GFSZA "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce." *Id.* at ___, 115 S.Ct. at 1631. Third, there were no express Congressional findings regarding the effects upon interstate commerce, and the arguments advanced in their absence would permit limitless assertions of federal power. *Id.* at ___, 115 S.Ct. at 1632.

While the Court found that the statute failed to satisfy all of these considerations, it did not assign the relative weights to be accorded each of these factors. It has been suggested that the Court left unclear, for example, whether a statute must satisfy all three of the *Lopez* considerations to be constitutional or whether it simply needs to satisfy one of them. *See United States v. Wall*, 92 F.3d 1444, 1460 (6th Cir.1996) (Boggs, J., concurring in

part and dissenting in part) ("Because the GFSZA satisfied none of the three subparts, the Court did not have to face the[ ] question [of the relationship between the subparts]. But [this question] cannot be ignored."). The Fifth Circuit's post-*Lopez* decisions do not directly address this issue either.

C. The Fifth Circuit's Post-*Lopez* Jurisprudence

Since *Lopez*, the Fifth Circuit has had two occasions to examine the validity of various federal criminal statutes in light of *Lopez*, and both times the Court has distinguished the statute at issue from the one struck down in *Lopez*. *See United States v. Rawls*, 85 F.3d 240, 242 (5th Cir.1996) (upholding 18 U.S.C. § 922(g), prohibiting possession by a felon of a firearm shipped in interstate commerce); *United States v. Coleman*, 78 F.3d 154, 158 (5th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 230, 136 L.Ed.2d 161 (1996) (upholding 18 U.S.C. § 2119, prohibiting carjacking); *see also United States v. Kuban*, 94 F.3d 971, 973 (5th Cir.1996) (upholding Section 922(g) by summarily citing *Rawls*).[4]

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[4] The Court notes that the Fifth Circuit had a third occasion to rule on the constitutionality of a federal criminal statute under the Commerce Clause post-*Lopez*. *See United States v. Kirk*, 70 F.3d 791, 795-96 (5th Cir.1995) (upholding 18 U.S.C. § 922(o), prohibiting the transfer or possession of machine guns manufactured or illegally transferred after May 19, 1986). However, the decision in Kirk was recently vacated, and the case is presently pending before the en banc court. *See* 78 F.3d 160 (1996).

In *United States v. Coleman*, the Court clarified that the type of rational basis review required under *Lopez* is a deferential form of review. Citing *Lopez*, the *Coleman* Court held:

> In reviewing an act of Congress passed pursuant to the Commerce Clause, courts traditionally defer to Congress because '[t]he Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise.' *Lopez* 514 U.S. at ___, 115 S.Ct. at 1634 (Kennedy, J., concurring). The proper inquiry on review is 'whether a rational basis existed for [Congress] concluding that a regulated activity sufficiently affected interstate commerce.' *Id.* at ___, 115 S.Ct. at 1629.

Coleman, 78 F.3d at 157-58.

The *Coleman* Court went on to find the carjacking statute constitutional and distinguished it from the statute in *Lopez* because "the carjacking statute has none of the deficiencies noticed by the Supreme Court [in *Lopez*] – lack of any connection with commerce or economic enterprise, broadly defined; lack of a jurisdictional element; and lack of congressional findings on the nexus with interstate commerce." *Coleman*, 78 F.3d at 159.

In *United States v. Rawls*, the Fifth Circuit found 18 U.S.C. § 922(g), a federal statute prohibiting possession by a felon of a firearm shipped in interstate commerce, constitutional under the Commerce Clause. The Court in *Rawls* had the benefit of five other circuit court opinions on the same issue, each of which had concluded that Section 922(g) was constitutional under the Commerce Clause. In light of the extensive amount of persuasive

authority supporting the constitutionality of the statute, the Court declined to provide an exhaustive analysis of the issue. *See Rawls*, 85 F.3d at 242. The *Rawls* Court did, however, distinguish Section 922(g) from the GFSZA on the basis that Section 922(g) contained a jurisdictional element, which limited the regulated activity to possession of firearms that had previously traveled in interstate commerce. The Court held that "[c]entral to the Court's holding in *Lopez* was the fact that § 922(g) contained 'no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce.' " *Id.* (quoting *Lopez*, 514 U.S. at ___, 115 S.Ct. at 1631). Further, every case the Court cited in support of its ruling had justified the post-*Lopez* constitutionality of the statute on the existence of the statutory jurisdictional element. *See United States v. Sorrentino*, 72 F.3d 294, 296 (2d Cir.1995); *United States v. Bell*, 70 F.3d 495, 498 (7th Cir.1995); *United States v. Shelton*, 66 F.3d 991, 992 (8th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1364, 134 L.Ed.2d 530 (1996); *United States v. Hanna*, 55 F.3d 1456, 1462 & n. 2 (9th Cir.1995); *United States v. Collins*, 61 F.3d 1379, 1383-84 (9th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 543, 133 L.Ed.2d 446 (1995); *United States v. Bolton*, 68 F.3d 396, 400 (10th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 966, 133 L.Ed.2d 887 (1996). *Rawls'* emphasis on the centrality of the jurisdictional element and the case law it relies on suggest that the presence of a jurisdictional element permits a finding of constitutionality, without the need to address the other two *Lopez* considerations.

In summary, the relevant inquiry post-*Lopez*, is "whether a rational basis existed for [Congress] to

conclude that a regulated activity sufficiently affected interstate commerce." *Coleman*, 78 F.3d at 157-58. The Court finds that this deferential standard can be met by a showing that the activity to be regulated satisfies any one of the *Lopez* considerations. This follows because each of the considerations appear to be sufficient to furnish the requisite nexus, *i.e.*, either the activity is connected with interstate commerce or an economic enterprise (*i.e.*, the traditional turf of the Commerce Clause), or Congress requires a nexus with interstate commerce in each case to assert jurisdiction over the activity, or there are Congressional findings that support the conclusion that a rational basis existed for Congress to conclude that the activity in issue substantially affects interstate commerce. It would be redundant to require a separate jurisdictional statement if a case involves clear-cut commercial activity for which the nexus with interstate commerce is obvious. Alternatively, if Congress expressly requires an effect on interstate commerce in each case to assert jurisdiction over a particular activity, Congressional findings are redundant. Moreover, it is clear from the structure of the *Lopez* opinion that a statute need not satisfy all three considerations to be constitutional. There would have been no need to discuss the third consideration, for example, if failure to meet either one of the first two were sufficient to condemn the statute. Applying these principles, the Court will now examine the validity of each of the statutes in issue.

D. The Validity of Section 1955 After *Lopez*

18 U.S.C. § 1955 reads in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both. (b) As used in this section – (1) "illegal gambling business" means a gambling business which – (I) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day. (2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

18 U.S.C. § 1955.

Since the *Lopez* decision, one Circuit Court has reviewed the validity of 18 U.S.C. § 1955 under the Commerce Clause. In *United States v. Wall*, 92 F.3d 1444 (6th Cir.1996), the Sixth Circuit applied the *Lopez* substantial effects test and concluded that Section 1955 is constitutional because it is a regulation of an activity having a substantial relationship to interstate commerce. This Court agrees with that conclusion.

First, the Court notes, as did the *Wall* Court, that Section 1955, unlike the statute struck down in *Lopez*, has a commercial aspect to it:

> On its face, [Section 1955] has a commercial aspect. It does not prohibit gambling per se; rather, it punishes those who 'conduct[ ] . . . an illegal gambling business.' 18 U.S.C. § 1955(a) (emphasis added). To sustain a conviction, Congress required federal prosecutors to demonstrate that a certain amount of commercial activity took place – the business had to 'remain[ ] in substantially continuous operation for a period in excess of thirty days or ha[ve] a gross revenue of $2,000 in any single day.' *Id.* § 1955(b)(1)(iii). Gambling itself, in its multiple forms, is a commercial activity. . . . By its terms, § 1955 is commercial in nature and is not favorably compared to possession of a gun in a school zone, which clearly does not involve commercial activity.

Wall, 92 F.3d at 1449.

It is true that the statute does not contain an explicit jurisdictional requirement. However, unlike the GFSZA, Section 1955 contains much legislative historical information to guide the Court in its determination of the reasonableness of Congress' conclusion that illegal gambling has a substantial effect on interstate commerce. Congress passed Section 1955 as part of Title VIII of the Organized Crime Control Act of 1970 in an attempt to attack sophisticated, large-scale illegal gambling operations, which Congress thought to be a major source of funding for organized crime. Congress made the following explicit findings regarding the effect of illegal gambling operations on interstate commerce:

> The Congress finds that (1) illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities

> thereof; (2) illegal gambling is dependent upon facilities of interstate commerce for such purposes as obtaining odds, making and accepting bets, and laying off bets; (3) money derived from or used in illegal gambling moves in interstate commerce or is handled through the facilities thereof; (4) paraphernalia for use in illegal gambling moves in interstate commerce; and (5) illegal gambling enterprises are facilitated by the corruption and bribery of State and local officials or employees responsible for the execution or enforcement of criminal laws.

S.Rep. No. 91-617, 91st Cong., 1st Sess. 16 (1969).

Congress also "found that organized crime had developed complex channels through which ostensibly local gambling operations sent their revenues to central coffers." *United States v. Sacco*, 491 F.2d 995, 999 (9th Cir.1974) (citing President's Commission on Law Enforcement and Administration of Justice, Report: The Challenge of Crime in a Free Society 189 (1967) and Task Force Report: Crime and Its Impact – an Assessment 52-53 (1967)). Congress also concluded that large scale illegal gambling operations "distorted the production of goods for commerce and the flow of goods in interstate commerce." *Id.* (citing 116 Cong.Rec. 604 (1970) (remarks of Senator Allott), and 116 Cong.Rec. 35199 (1970) (remarks of Congressman St. Germain)). As the Fifth Circuit noted in *United States v. Harris*, "[t]he Congressional Record is filled with evidence to support the[se] conclusions. . . . " *Harris*, 460 F.2d at 1045 and n. 3 (noting that in considering passage of the Organized Crime Control Act of 1970,

Congress had before it the 1967 Report of President Johnson's Commission on Law Enforcement and the Administration of Justice).

Moreover, Congress's rationale offers a rational stopping point for the role of the federal government in regulating illegal gambling activities. Mindful of the Tenth Amendment and the rights of the states, Congress made a point of not regulating all illegal gambling activity, but rather only large scale operations that were likely to have a substantial impact on interstate commerce. This was the reason that Congress drafted the statute so that it covered only gambling businesses that "involve[ ] five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business" and that have "been or remain[ed] in substantially continuous operation for a period in excess of thirty days or has gross revenue of $2,000 in any single day." 18 U.S.C. § 1955(b)(ii) and (iii). This intention is evidenced by the following statement from the legislative history of Section 1955:

> The intent of . . . section 1955, below, is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. . . . The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and

> those corrupt State and local officials who make it possible for them to function.

1970 U.S.Code Cong. and Admin.News 4007, 4029.

In light of this extensive record, this Court cannot find that Congress was unreasonable when it determined that gambling businesses of the type regulated by Section 1955 have a substantial effect on interstate commerce. Nor does the Court find that acceptance of Congress's reasoning would lead to boundless federal power. In fact, this Court finds that Section 1955 was the result of reasoned findings concerning the impact of *large-scale, continuous* gambling operations on interstate commerce. Accordingly, the Court finds Section 1955 facially constitutional.

The Court also finds the statute to be constitutional as applied in this case. The Court agrees entirely with the analysis of the Sixth Circuit's majority in *Wall*, which found that Section 1955 was constitutional as applied to defendants who owned and operated an illegal business that leased video poker machines to various establishments, all of which were in the state of Tennessee. Even if, as defendant Goodson claims, the defendants' alleged behavior were totally local in nature, the as-applied challenge in this case would fail for the same reason the *Wall* Court gave for rejecting the as-applied challenges in that case. As the *Wall* Court concluded:

> In the case at hand, there was no evidence that defendants were engaged in a gambling enterprise that filled organized crime coffers. This case appears to be one of those 'rare instances where a gambling operation meeting

> the requirements of 1955 will be a local operation, in no way connected with organized crime.' *Sacco*, 491 F.2d at 1000. **Congress, however, may regulate commercial activities that, although intrastate in nature, comprise a class of activities that substantially affect interstate commerce. Courts may not excise individual instances of a class of commercial activities that is within the reach of federal power**. *Perez v. United States*, 402 U.S. 146, 154, 91 S.Ct. 1357, 1361, 28 L.Ed.2d 686 (1971); *see also Lopez*, 514 U.S. at ___, 115 S.Ct. at 1630. *Maryland v. Wirtz*, 392 U.S. 183, 192-93, 88 S.Ct. 2017, 2021-22, 20 L.Ed.2d 1020 (1968); *Wickard v. Filburn*, 317 U.S. 111, 127-28, 63 S.Ct. 82, 90-91, 87 L.Ed. 122 (1942); *United States v. Pack*, 16 F.3d 1222, No. 92-3872, 1994 WL 19945 at *2 (6th Cir. Jan. 25, 1994) (per curiam) **("If the class of activities is within the reach of federal power and the regulation imposed is reasonable, a court's investigation is concluded. There is no need for inquiry on a case-by-case basis or proof that a particular activity had a [substantial] effect on commerce.")** (quoting *Sacco*, 491 F.2d at 999); *cf. [United States v.] Gomez*, 87 F.3d [1093] at 1095-96 [(9th Cir.1996)] (noting that once the commercial nature of the activity is established, the courts must consider the aggregate effect of the activity on the commercial market).

Wall, 92 F.3d at 1450-51 n. 14 (emphasis added). *See also, Lopez*, 514 U.S. at ___, 115 S.Ct. at 1629 ("where a *general regulatory statute bears a substantial relation to commerce, the de minimis* character of individual instances arising under that statute is of no consequence.") (emphasis in original).

Moreover, the Court is not convinced by defendant's argument that the "evidence will not support any theory that the video poker business at issue . . . engaged in any business which had even a minimal effect on interstate commerce." Record Doc. No. 65 at 17. If the government produces the evidence that it says it will, that evidence would show that defendant's alleged gambling business had significant interstate commercial aspects to it. Specifically, the government states that the evidence will show that: 1) the video poker machines essential to the operation were manufactured in another state; 2) the negotiations for the purchase of property for, and the construction of, future video poker locations involved interstate commerce; 3) the truck stop facility was required to have monthly fuel sales in an amount that implicates interstate commerce both as to the customers purchasing the fuel and the supplier providing the fuel; and 4) the truck stop facility was required to have a liquor license and restaurant facilities sufficient to handle a minimum of 50 persons and had agreements with national food suppliers to meet these requirements.

Accordingly, defendant Goodson's challenges to Section 1955 are rejected.

E. The Validity of Section 1956 After *Lopez*

Defendant Fred Goodson concedes that the federal money laundering statute, 18 U.S.C. § 1956, is different from both the GFSZA and from Section 1955 in that by its express terms it limits application of the statute to certain transactions that affect interstate or foreign commerce "in any way or degree" or involve the use of a financial

institution which is engaged in or affects interstate or foreign commerce "in any way or degree." 18 U.S.C. § 1956(c)(4)(A) and (B). Goodson submits that the presence of such a tenuous jurisdictional link between the offense conduct and interstate commerce is insufficient to meet the requirements of *Lopez*. The Court disagrees.

As discussed above, the Fifth Circuit's post-*Lopez* jurisprudence demonstrates the critical significance of a statutorily required jurisdictional nexus to the statute's validity *vel non* under the Commerce Clause. *See Rawls*, 85 F.3d at 242 ("[central to the Court's holding in *Lopez* was the fact that § 922(q) contained 'no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce.' "). Further, the Supreme Court has held that the presence of even a tenuous jurisdictional nexus is to be read to invoke the full extent of Congress's Commerce Clause power. *See Russell v. United States*, 471 U.S. 858, 859, 105 S.Ct. 2455, 2456, 85 L.Ed.2d 829 (1985). Thus, the Fifth Circuit, pre-*Lopez*, concluded that the minimal jurisdictional nexus requirement of Section 1956 was intended by Congress to invoke the full extent of Congress's power under the Commerce Clause. *See Gallo*, 927 F.2d at 822-23. The Court stated that:

> Section 1956 applies to conduct that 'in any way or degree affects interstate or foreign commerce.' 18 U.S.C. § 1956(c)(4). The legislative history of the Act indicates that this phrase was derived from the Hobbs Act, 18 U.S.C. § 1951, 'and is intended to reflect the full exercise of

> Congress's power under the Commerce Clause.' S.Rep. No. 433, 99th Cong.2d Sess. 13 (1986).

Id.

Other circuits have come to the same conclusion. *See, e.g., United States v. Peay*, 972 F.2d 71, 74 (4th Cir.1992) ("We . . . hold that, in enacting § 1956, Congress intended to exercise the full legislative power conferred by the Commerce Clause.") Since Section 1956 is therefore to be interpreted to invoke the full extent of Congress' Commerce Clause powers, whatever they may be, the issue remains whether the defendant's alleged behavior had the requisite connection to interstate commerce for it to be constitutionally regulated under this statute. The Court finds that it had the requisite connection.

Defendant Fred Goodson is charged with five counts (i.e., Counts 8-12) of money laundering in violation of Section 1956. All of those counts involve one or more National Banks. Every financial institution involved is federally insured. *See United States v. Green*, 964 F.2d 365, 375 (5th Cir.1992) ("At oral argument [defendant's] counsel admitted he had never heard of a bank that did not affect interstate commerce in some way; NOR HAVE WE."). Two of the transactions (i.e., Counts 9 and 11) involve institutions in two different states: Louisiana and Mississippi. All of the counts involve the proceeds of an allegedly illegal gambling business, which, in this Court's view, implicated interstate commerce.

Finally, the Court notes that Section 1956 is also constitutional under Congress's power to collect taxes. *See United States v. Jensen*, 69 F.3d 906, 910 n. 5 (8th Cir.1995) ("In enacting the money laundering statute,

Congress exercised its authority not only under the Commerce Clause, but also under its authority to collect taxes, duties, imposts and excises. The reasoning of *Lopez* does not apply."). The statute itself makes it illegal to knowingly "conduct or attempt[ ] to conduct . . . a financial transaction which in fact involves the proceeds of specified unlawful activity – (A)(I) with the intent to promote the carrying on of specified unlawful activity; or (ii) *with intent to engage in conduct constituting a violation of section 7201 of the Internal Revenue Code of 1986. . . .* " 18 U.S.C. § 1956 (emphasis added). The invocation of Section 7201 of the Internal Revenue Code is especially pertinent to this case, because all of the money laundering counts allegedly involve either conduct constituting an alleged violation of the Internal Revenue Code of 1986 (counts 8 and 9) or movement of the proceeds of those alleged Internal Revenue Code violations (counts 10 through 12). Congress is doubtlessly empowered to regulate such activity under both the Necessary and Proper Clause and Congress's taxing powers. Thus, while some money laundering cases might not implicate the part of the statute passed pursuant to Congress' taxing powers, this case clearly does.

Accordingly, Goodson's motion to dismiss Counts 8 through 12 of the indictment on the grounds that Section 1956 is both facially unconstitutional and unconstitutional as applied to this case is denied.

III. Defendant Fred Goodson's Motion to Dismiss All Mail Fraud Counts and All Racketeering Acts Predicated on Mail Fraud

Defendant Fred Goodson moves this Court to dismiss Counts 3, 4, 5, and 6 and Racketeering Acts 1a, 1b, 1c, and 1d from the Indictment, all of which allege violations of 18 U.S.C. § 1341, the federal mail fraud statute. At issue is a question that has yet to be decided by the Fifth Circuit: whether video draw poker licenses constitute the "*money or property*" required to support a mail fraud conviction. After a consideration of the arguments presented by both parties and the relevant law, the Court finds that video poker licenses constitute property for purposes of the mail fraud statute. Accordingly, the Court denies defendant Fred Goodson's motion to dismiss the counts and racketeering acts that are predicated on mail fraud.

A. Background

The federal mail fraud statute, 18 U.S.C. § 1341, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (emphasis added).

Indictment counts 3 through 6 and racketeering Acts 1a, 1b, 1c, and 1d charge defendant Fred Goodson, and others,[5] with:

> knowingly and willfully devis[ing] and intend[ing] to devise a scheme and artifice to defraud, and to obtain property by means of false and fraudulent pretenses and representations; that is, to defraud the State of Louisiana and its citizens by fraudulently obtaining and renewing, through the submission of false and incomplete information, state licenses to operate video poker sites for Truck Stop Gaming, Ltd.

Superseding Indictment at 26.

Defendant Fred Goodson argues that these charges must be dismissed because state licenses to operate video poker sites do not constitute "property" for purposes of 18 U.S.C. § 1341. Defendant relies heavily upon the Supreme Court decisions in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), and *Carpenter v. United States*, 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987).

B. Defining Property Under the Mail Fraud Statute

In *McNally*, the former chairman of the Kentucky Democratic Party orchestrated a scheme that steered state

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[5] Counts 3 through 6 charge defendants Carl Cleveland, Fred Goodson, and Maria Goodson with mail fraud. Counts 5 and 6 also charge defendant Joe Morgan with mail fraud. Racketeering acts 1a, 1b, 1c, and 1d incorporate the acts alleged in counts 3, 4, 5, and 6, respectively.

workman's compensation insurance contracts to an agency that agreed to share commissions with other insurance agencies specified by the former chairman. The trial court's jury instruction allowed for a conviction in the event that the jury found a scheme to defraud Kentucky and its citizens of the right to have the state's business conducted "honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud." *McNally*, 483 U.S. at 355 n. 4, 107 S.Ct. at 2878 n. 4. After a mail fraud conviction based on this instruction, the Supreme Court reversed, rejecting the application of the mail fraud statute to "schemes to defraud citizens of their intangible rights to honest and impartial government." *Id.*, 483 U.S. at 356, 107 S.Ct. at 2879. The Court held that the mail fraud "statute is limited in scope to the protection of property rights." *Id.*, 483 U.S. at 360, 107 S.Ct. at 2882. The Court concluded that "any benefit which the Government derives from the statute must be limited to the Government's interests as a property holder." *Id.*, 483 U.S. at 358 n. 8, 107 S.Ct. at 2881 n. 8.

After *McNally*, the Supreme Court held in *Carpenter v. United States* that Section 1341 encompasses intangible property as well as tangible property. *Carpenter*, 484 U.S. at 25, 108 S.Ct. at 320. Specifically, the Court found that a scheme to take the Wall Street Journal's publication schedule and the contents of its "Heard on the Street" column constituted a scheme to take "property" under the mail fraud statute. *Id.*

Congress also acted shortly after the *McNally* decision to lessen its impact by enacting 18 U.S.C. § 1346, which extends the reach of the mail and wire fraud statutes to include "[any] scheme or artifice to deprive

another of the intangible right of honest services." 18 U.S.C. § 1346. Defendant argues that the video poker licenses do not satisfy the mail fraud statute's property requirement under *McNally* and *Carpenter*, and that Section 1346 does not alter this result.[6] The Court finds that neither *McNally* nor *Carpenter* compels that conclusion because neither of them has anything to say on the specific issue of whether licenses constitute property.

Defendant also relies on a number of circuit court decisions that have held that state-issued licenses of various sorts are not property for purposes of Section 1341. *See United States v. Novod*, 927 F.2d 726, 728 (2d Cir.1991) (state dumping permit); *United States v. Schwartz*, 924 F.2d 410, 417-18 (2d Cir.1991) (arms export license); *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir.1990) (school bus operator permit); *United States v. Kato*, 878 F.2d 267, 268-69 (9th Cir.1989) (pilot license); *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir.1989) (cab driver license); *United States v. Murphy*, 836 F.2d 248, 253-54 (6th Cir.), *cert. denied*, 488 U.S. 924, 109 S.Ct. 307, 102 L.Ed.2d 325 (1988) (bingo license); *United States v. Dadanian*, 856 F.2d 1391, 1392 (9th Cir.1988) (gambling license). These decisions all state that a license achieves property status only when it is in the hands of the licensee – i.e., that a license is without value to the state and therefore is not property

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[6] It is true that the government does not rely on Section 1346 as a basis for criminal liability in the indictment, since it did not charge defendant with depriving another of the intangible right to honest services. The Court notes, however, that Congress' action in passing Section 1346 demonstrates an intent to broaden the scope of what is considered property for purposes of the mail fraud statute.

before it is issued. Moreover, each of these decisions finds that in issuing the licenses, the state acted as a regulator not a property owner. For example, in the *Schwartz* decision, the Second Circuit found that an arms export license did not constitute property for purposes of the mail fraud statute because the license was simply a means of regulating the private use of private property. The Court stated:

> The government's interest in issuing its licenses ancillary to its regulatory program is no different than its interests in propounding and enforcing its other regulations with broad based applications that do not include the issuance of licenses. Whether it chooses to use licenses or blanket rules, the government's purpose is to control the private use of private property. Thus, a regulatory license is nothing more than a formal embodiment of 'the necessary government approval.'

Schwartz, 924 F.2d at 417 (internal citation omitted). *See also Toulabi*, 875 F.2d at 125. ("From the government's perspective, however, the [taxi cab] license is a promise not to interfere rather than a sliver of property. . . . [This] is a regulatory rather than property interest.").

In response to the defendant's arguments, the Government points to three decisions – in the First Circuit, the Third Circuit, and the Eastern District of Louisiana – which hold that licenses constitute property for purposes of the mail fraud statute. *See United States v. Bucuvalas*, 970 F.2d 937 (1st Cir.1992); *United States v. Martinez*, 905 F.2d 709, 712-14 (3d Cir.1990); *United States v. Carollo*, 1995 WL 505461 (E.D.La. Aug. 22, 1995) (video poker licenses in Louisiana) (appeal pending). In *Martinez*, the Third

Circuit found medical licenses to be property for purposes of the mail fraud statute. The Court rejected the argument that there is no loss of property by the state when it issues a license to someone in reliance on fraudulent information. The Court found no reason to draw an "esoteric distinction between an unissued and an issued license." *Martinez*, 905 F.2d at 715. The Court reasoned:

> This argument depends on the questionable statutory construction that someone who fraudulently acquires property that has great value once acquired, has not violated the mail fraud statute if the item acquired had no, or negligible, value in the hands of the victim. Nothing in the statutory language supports that theory. The statute, which proscribes 'obtaining money or property,' is broad enough to cover a scheme to defraud a victim of something that takes on value only in the hands of the acquirer as well as a scheme to defraud a victim of property valuable to the victim but valueless to the acquirer.

Id. at 713.

In *Bucuvalas*, the First Circuit likewise held that an entertainment and liquor license was property for the purposes of Section 1341. It was also unimpressed with the argument that the City's interest in the unissued licenses was not property:

> [G]iven the Court's expansive interpretation of the term 'property' in *Carpenter* . . . we believe the municipal government's interest in these alcoholic beverage and entertainment licenses was in the nature of a 'property' interest within the meaning of *McNally* and *Carpenter*. In its broadest sense, a 'property' interest resides in

> the holder of any of the elements comprising the 'bundle of rights' essential to the use or disposition of tangible property or to the exercise or alienation of an intangible right. For instance, in *Carpenter* the defendant held a possessory interest in the wrongfully-disposed confidential information, while the Wall Street Journal retained the right to control the manner of its use, dissemination, and alienation. Similarly, the City of Boston had the right to control the issuance of these licenses, in order to assure their issuance to deserving licensees only.

Bucuvalas, 970 F.2d at 945 (internal citations omitted). The Court went on to add that even if the licenses did not become property until they were issued, the city retained a right to control their alienation by the licensees, which was a property right, the deprivation of which could support a conviction for mail fraud. *Id.*

This Court agrees with the First and Third Circuit's conclusion that licenses constitute property even before they are issued. A distinction between an unissued and issued license belongs in the realm of metaphysics, not in a common sense application of the law. As one district court has held, "[t]o hold, as some courts have, that such valuable property vanishes when held in the hands of the issuer strikes the Court as preposterous." *United States v. Berg*, 710 F.Supp. 438, 444 (E.D.N.Y.1989) (internal citation omitted). The Court finds no reason to make distinctions of such pointless subtlety. The Court finds that video poker licenses are property and the challenged scheme deprived the state of its right to dispose of its property.

Further, although the Fifth Circuit has yet to rule on the matter, Fifth Circuit law strongly suggests that the

strained distinction between issued and unissued licenses should be rejected. In *United States v. Loney*, 959 F.2d 1332 (5th Cir.1992), for example, the Court rejected an argument from the defendant that frequent flyer coupons do not constitute property for purposes of the federal fraud statutes. The Court in *Loney* rejected the defendant's argument, noting that "we construe 'property' in a broad sense for purposes of the federal fraud statutes." *Id.* at 1336. Noting that the *McNally* Court defined property as "things of value," *see McNally*, 483 U.S. at 358, 107 S.Ct. at 2881, the court concluded that frequent flyer coupons were clearly "something of value" because they could be used to obtain free flight tickets. *Id.* The court remarked that "[i]f such coupons did not represent something of value, one wonders why [the defendant] went to such trouble to obtain and sell them." *Id.* at 1336 n. 8.

The defendant's argument that video poker licenses are not property in the hands of the State because they only take on value after they are issued applies equally in the context of frequent flyer coupons. Frequent flyer coupons generally have little to no value to the issuer and arguably take on value only after they are issued to a customer of the airlines. While the airlines cannot use the coupons themselves, the Fifth Circuit still found them to be property for purposes of the federal fraud statutes because they represent a "bundle of rights" that the airlines can dispose of as they see fit – the disposal of which significantly affects the airline financially. This Court finds no principled reason for making a distinction between issued and unissued licenses, especially when the Fifth Circuit has refused to make a distinction between issued and unissued frequent flyer coupons.

Accordingly, *Loney* provides another rationale for rejecting defendant's argument.

Moreover, as one court has noted, "[t]he view . . . that licenses are property in the hands of the licensees, but never in the hands of the government represents an inversion of historical fact." *United States v. Turoff*, 701 F.Supp. 981, 988 (E.D.N.Y.1988). As noted in a seminal article by Professor Charles Reich on the history of property rights, licenses and other forms of government largess were traditionally considered to be property that belonged to the state before it was given to private citizens:

> The chief obstacle to the creation of private rights in [government] largess [e.g., licenses, welfare benefits, services, contracts and franchises] has been the fact that it is originally public property, comes from the state, and made [sic] be withheld completely.

Charles Reich, The New Property, 73 *Yale L.J.* 733, 778 (1964). *See also Martinez*, 905 F.2d at 714; *Turoff*, 701 F.Supp. at 989-90 (Salutary fact that in modern times courts recognize property rights in licenses need not blind us to the fact that licenses originate in the state and are public property in the first instance.).

Furthermore, the Court finds that the facts of this case distinguish it from those cited by the defendant. As the government points out, the cases cited by the defendant focus on the State's lack of property interest in licenses solely involving the Government's exercise of a regulatory function. *See, e.g., Schwartz*, 924 F.2d at 417 ("The government's interest in issuing its licenses ancillary to its regulatory program is no different than its

interests in propounding and enforcing its other regulations with broad based applications that do not include the issuance of licenses."); *Toulabi*, 875 F.2d at 125 ("All the license signifies from the City's perspective is that the driver met the substantive criteria for the profession . . . nothing more. . . . [This] is a regulatory rather than property interest."). Video poker is different, however, in that the State of Louisiana is more than just a mere regulator of the video poker industry and has much more of a direct financial interest in the video poker licenses than the government entities did in the cases cited by the defendant.

It is noteworthy that until recently, the business of video poker was illegal in Louisiana. One of the main reasons for the recent legalization of video poker was that it was considered an ongoing source of revenue for the State. Accordingly, Louisiana has set strict requirements to insure that the State receives its pro rata share of video poker receipts. Under the provisions of La.R.S. 33:4862.11(D)(2), for example, there is a 22.5% mandatory "franchise payment" of net video poker revenues that must be paid by all licensees into the "state treasury."[7] The State protects its interest in these revenues by 1) connecting each operating video poker machine to a central State computer in Baton Rouge, which records all of

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[7] The Court notes that the Louisiana Legislature's use of the term "franchise" is significant in light of Louisiana jurisprudence. Under Louisiana law, a franchise conferred by a government subdivision upon a private entity has been termed "a valuable property right." *Washington-St. Tammany Electric Cooperative, Inc. v. St. Tammany Parish Police Jury*, 612 So.2d 773, 777 (La.App. 1st Cir.1992), *writ denied*, 614 So.2d 86 (1993).

the money taken in and paid out in winnings; 2) issuing licenses only to people who meet certain qualifications; and 3) making such licenses nontransferable. The Court finds that, in light of the State's continued control over and considerable financial stake in the video poker industry, video poker licenses under Louisiana law are significantly different than the taxi cab driver's licenses, pilot licenses, state dumping licenses, bingo licenses, and arms trade licenses that were at issue in the cases cited by the defendant.

The case of *Borre v. United States*, 940 F.2d 215 (7th Cir.1991), is instructive. In *Borre*, the Seventh Circuit held that the government had a property interest in a cable television franchise in spite of the Seventh Circuit's earlier holding in *Toulabi*, 875 F.2d at 125, that taxi licenses do not constitute government property. In distinguishing a cable television franchise from the taxi licenses in *Toulabi*, the *Borre* court concluded that "a cable television franchise represents far more than a mere 'promise not to interfere' by the government." *Borre*, 940 F.2d at 221 (quoting *Toulabi*, 875 F.2d at 125). The same could be said of the video poker licenses involved in this case.

As the government points out, under Louisiana law, when the state awards a video poker license, it is functionally equivalent to awarding a franchise from which the State receives a significant percentage of revenue and over which it continues to exercise a great deal of control. In light of the State's continued financial interest in each video poker license it issues, these video poker licenses are substantially different from regulatory licenses and should be considered property because the state acts more as a property owner than as a "mere regulator."

In arguing that the state has no property interest in video poker licenses, the defendant also relies on La.R.S. 33:4862.1(D), which provides that:

> Any [video poker] license applied for, granted, or issued under the provisions of this Part is a pure and absolute privilege. . . . Any license issued or renewed under the provisions of this Part is not property or a protected interest under the constitutions of either the United States or the state of Louisiana. La.R.S. 33:4862.1(D).

The Court does not agree with the defendant that this statute mandates a finding that the licenses are not property for purposes of the mail fraud statute. First, the Court notes that when determining whether something constitutes property for purposes of the federal fraud statutes, courts must look not only to state statutes, but also to "traditional property law." *See Martinez*, 905 F.2d at 713; *Carollo*, 1995 WL 505461 at *2. Under traditional property law, owners of licenses are generally considered to have a protective property interest. *Id.* (citing *Mackey v. Montrym*, 443 U.S. 1, 10, 99 S.Ct. 2612, 2617, 61 L.Ed.2d 321 (1979); *Beauchamp v. DeAbadia*, 779 F.2d 773, 775 (1st Cir.1985); *Keney v. Derbyshire*, 718 F.2d 352, 354 (10th Cir.1983); *Kudish v. Bradley*, 698 F.2d 59, 61 (1st Cir.1983)); *cf. In re National Cattle Congress, Inc.*, 179 B.R. 588, 593 (N.D. Iowa 1995) (dog racing license constitutes property of estate in bankruptcy), *appealed on other grounds*, 91 F.3d 1113 (8th Cir.1996); *In re Crescent City Capital Development Corp.*, No. 95-12735-B, 95-12736-B at 7-11 (E.D.La. Oct. 2, 1995) (riverboat gaming license constitutes property of estate in bankruptcy).

Moreover, the Court notes that the Supreme Court and the Fifth Circuit have both stated that property is to be interpreted broadly for purposes of the federal fraud statutes. *McNally*, 483 U.S. at 356, 107 S.Ct. at 2880 (citing *Durland v. United States*, 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709 (1896)); *Loney*, 959 F.2d at 1335-36.[8] That the Louisiana State Legislature has decided to deprive video poker licensees of a property interest in the context of 22:4862.1(D) does not mean that federal courts must apply that deprivation in all contexts. *Cf. Loney*, 959 F.2d at 1335-36 (recognizing that courts can construe things as property in one context but as not property in another). Congress could have expressly made the definition of property in Section 1341 completely dependent on state law definitions of property, but it chose not to do so. Consequently, the Court must look to traditional property law as well as state law in making its determination. Traditional property law clearly suggests that video poker licenses constitute property.

In any event, this Court concludes that the existence of La.R.S. 22:4862.1(D), if anything, hurts the defendant's position that the State has no property interest in the video poker licenses in that the statute is designed to limit the property rights of the licensees, so as to give the State a stronger interest in the licenses even after they are issued. In attempting to limit the property rights of video poker licensees through La.R.S. 22:4862.1(D), the State

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[8] As noted above, Congress, in passing 18 U.S.C. § 1346, also expressed its desire that courts should interpret property broadly for purposes of the federal fraud statutes. *See* note 6, *supra*, and accompanying text.

has made clear its intent to have video poker licensees act as if they were franchisees, thus protecting the State's significant financial interest in the industry. The statute reflects that the State wanted to keep to itself as much of an interest in the licenses as possible.

Finally, the Court rejects defendant Goodson's argument that federalism concerns are implicated by this motion. In short, since the Court finds that the video poker licenses in question are property for the purposes of Section 1341, the Court concludes that this is not "an unwarranted intrusion by the federal government into the conduct of state affairs," as defendant describes it. Record Doc. No. 66 at 16. Nor are comity concerns significantly implicated here because this interpretation of the mail fraud statute does not criminalize conduct that would otherwise be legal under state law. *See* La.R.S. 27:309(A) (providing criminal penalties for false statements intentionally made on video poker license applications).

The Court finds that the mail fraud charges in the superseding indictment are not facially invalid, as defendant suggests, and denies defendant Fred Goodson's motion to dismiss all mail fraud counts and to dismiss all racketeering acts alleging mail fraud violations. Accordingly,

IT IS ORDERED that defendant Goodson's motion to dismiss racketeering acts 1a, 1b, 1c, 1d and Counts 3, 4, 5, and 7 is hereby DENIED.

IT IS FURTHER ORDERED that defendant Goodson's motion to dismiss racketeering acts 2a, 2b, 2c, 2d, 2e and Counts 7, 8, 9, 10, 11, and 12 is hereby DENIED.

APPENDIX F

STATUTORY PROVISIONS

(18 U.S.C.)

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Supreme Court, U.S.
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Nos. 99-804 and 99-939

In the Supreme Court of the United States

CARL W. CLEVELAND, PETITIONER

v.

UNITED STATES OF AMERICA

FRED H. GOODSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether video poker licenses issued by the State of Louisiana constitute "property" within the meaning of the mail fraud statute, 18 U.S.C. 1341.

2. Whether the district court committed plain error in failing to instruct the jury on the materiality element of a mail fraud offense.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a[1]) is reported at 182 F.3d 296. The opinion of the district court (Pet. App. 52a-86a) is reported at 951 F. Supp. 1249.

[1] References to "Pet." and "Pet. App." are to No. 99-804 unless otherwise specified.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1999. The petition for rehearing was denied on September 2, 1999. The petition for a writ of certiorari in No. 99-804 was filed on November 9, 1999. The petition for a writ of certiorari in No. 99-939 was filed on December 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners Cleveland and Goodson were convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c); conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); and two counts of mail fraud, in violation of 18 U.S.C. 1341. In addition, petitioner Cleveland was convicted of four counts of money laundering, in violation of 18 U.S.C. 1956; tax conspiracy, in violation of 18 U.S.C. 371; and filing a false tax return, in violation of 26 U.S.C. 7206(2). Petitioner Goodson was convicted of five counts of money laundering and three counts of the use of interstate communications in aid of state bribery, in violation of 18 U.S.C. 1952. Each petitioner was sentenced to 121 months' imprisonment. In addition, the district court ordered the forfeiture of their interests in two business entities. The court of appeals affirmed. Pet. App. 1a-44a.

1. The evidence at trial showed that, in early 1992, petitioner Fred Goodson and his family formed TSG, Ltd., and its corporate partner, TSG, Inc., in order to participate in the video poker business at their truck

stop in Slidell, Louisiana. With the assistance of petitioner Carl Cleveland and petitioner Goodson's law firm, Cleveland, Barrios, Kingsdorf & Casteix, the Goodsons prepared and submitted to the Louisiana State Police applications for a gaming license for TSG, Ltd. The applications required partnerships seeking gaming licenses to identify their partners; to submit personal financial statements for all partners; to affirm that the listed partners were the sole beneficial owners; and to affirm that no partner had an arrangement to hold his interest as "an agent, nominee or otherwise," or a present intention to transfer any interest in the partnership at a future time. Pet. App. 2a-3a.

The initial application submitted on behalf of TSG, Ltd., identified Maria and Alex Goodson, Fred Goodson's adult children, as the limited partners and TSG, Inc., as the general partner. The application listed no other persons or entities as having any ownership interest in TSG, Ltd. TSG, Ltd. submitted renewal applications in 1993, 1994, and 1995 that also listed no additional ownership interests. In fact, at all times the true owners of the company were petitioners Goodson and Cleveland. The two concealed their ownership interest from state regulators in order to avoid the probing inquiry of the State's suitability assessment. Pet. App. 5a-6a.

2. The mail fraud statute, 18 U.S.C. 1341, makes it a crime to use the mail in connection with "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The mail fraud counts of the indictment charged that the defendants had devised a scheme to deprive the State of Louisiana and its citizens of "property" by "fraudulently obtaining and renewing, through the submission of false and in-

complete information, state licenses to operate video poker sites." Pet. App. 74a.

Before trial, petitioner Cleveland adopted a motion filed by his co-defendant, petitioner Goodson, to dismiss the mail fraud counts on the ground that state licenses to operate video poker sites do not constitute "property" within the meaning of Section 1341. Petitioners argued, among other things, that such licenses do not become property until they are issued, because they have no value to the State. Accordingly, in petitioners' view, an attempt to acquire a state license through false representations does not implicate any state property interest. The district court rejected that contention. Pet. App. 73a-86a.

3. On appeal, petitioners renewed their contention that state licenses do not constitute property for purposes of the mail fraud statute. Relying on *United States* v. *Salvatore*, 110 F.3d 1131 (5th Cir.), cert. denied, 522 U.S. 981 (1997), the court of appeals affirmed the ruling of the district court. See Pet. App. 19a. In *Salvatore*, the court, applying *McNally* v. *United States*, 483 U.S. 350 (1987), and *Carpenter* v. *United States*, 484 U.S. 19 (1987), reasoned that "in considering whether video poker licenses constitute property under the mail fraud statute, we must determine whether Louisiana has an interest in the licenses as a property holder." 110 F.3d at 1139. The court held that Louisiana had more than just a regulatory interest in the video poker licenses, thereby justifying application of the mail fraud statute. *Ibid.*

The *Salvatore* court first reasoned that the concept of property involves a legal "bundle of rights," including the rights to "possess, use, and dispose" of a particular article. 110 F.3d at 1140. As applied to licenses, the court found that that "bundle" includes the right to

control their issuance. The court also concluded that Louisiana had "zealously sought to protect its right to control the [video poker] licenses" at issue here. *Ibid.* The court went on to reject a distinction between issued and unissued licenses, finding that unissued video poker licenses had value to the State. *Id.* at 1141. The court further determined that the State has a property, and not merely a regulatory, interest in the video poker licenses, because the State had "a direct and significant [continuing] financial stake * * * as issuer of the licenses" in the video poker industry. *Id.* at 1142.

The court of appeals concluded that the Louisiana statutory scheme, by expressly stating a limitation on the property interests of licensees, evinces an intent that the State is to maintain its control and ownership of video poker licenses. 110 F.3d at 1142 (discussing La. Rev. Stat. Ann § 27:301(D) (West Supp. 1997)). Similarly, after applying traditional property law concepts, the court found that the licenses constituted property. *Id.* at 1142-1143.

4. Following oral argument on petitioners' appeal, petitioners sought leave to file a supplemental brief in light of this Court's intervening decision in *Neder* v. *United States*, 119 S. Ct. 1827 (1999), which held that the materiality of the falsehoods used in a scheme to defraud is an element of a mail fraud offense, *id.* at 1841. Petitioners argued that the district court committed plain error in failing to give a materiality instruction. The government opposed petitioners' motion, arguing that supplemental briefing was unnecessary because the issue had been waived, the district court had in any event included materiality language in the jury charge, and the defendants in fact had argued materiality to the jury. The court of appeals denied the

motion and did not address the issue in its opinion issued eight days later.

ARGUMENT

1. Petitioner Cleveland contends (Pet. 9-21) that the video poker licenses do not constitute "property" within the meaning of the mail fraud statute, 18 U.S.C. 1341. Petitioner Goodson (99-939 Pet. 11) adopts petitioner Cleveland's argument.[2] The courts below correctly rejected that contention, and it does not warrant further review.

a. In *Carpenter* v. *United States*, 484 U.S. 19 (1987), the court affirmed the wire fraud conviction of a *Wall Street Journal* columnist who had traded stock before publication of his newspaper column based on his knowledge of what the column would say. The Court made clear that the intangible nature of the misappropriated confidential information did not make the information any less a form of "property" within the mail fraud statute. *Id.* at 25-27. The Court explained

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[2] The court of appeals stated that "Maria Goodson and Attorney Cleveland assert that a Louisiana video poker license is not 'property' for purposes of the mail fraud statute." Pet. App. 19a. Petitioner Fred Goodson unsuccessfully requested that the court of appeals modify its decision to reflect that he too had raised the property/license issue on appeal from the district court judgment. The government opposed that motion on the ground that petitioner Goodson had not properly developed that argument under Federal Rule of Appellate Procedure 28(i) and had improperly attempted to adopt petitioner Cleveland's argument. The court of appeals denied petitioner Goodson's motion and did not modify its decision. Thus, in the court below, petitioner Goodson waived his opportunity to contend that the district court had erred in rejecting petitioner Cleveland's argument that Louisiana video poker licenses are not "property" within the ambit of the mail fraud offense.

that the *Journal* had been deprived of its property right to make exclusive use of its confidential information, even though the defendants had not totally deprived the *Journal* of its possession of the information or its ability to publish it. *Id.* at 26-27.

Here, the State of Louisiana had a property interest in the unissued video poker licenses similar to the *Wall Street Journal*'s interest in maintaining the confidentiality of its business information. In *Carpenter*, the Court held that the *Journal*'s exclusive right to control its confidential information was a property interest. 484 U.S. at 26. By the same token, in this case, "what the [State] (and derivatively its people) lost was the right to keep its [video poker] licenses to itself and to bestow them on persons who had fairly earned them." *United States* v. *Martinez*, 905 F.2d 709, 714 (3d Cir.), cert. denied, 498 U.S. 1017 (1990). The State also lost the right to control who handled a substantial, continuing source of earnings under the licenses. The court of appeals thus correctly found that the licenses had continuing value to the State.

b. Petitioner Cleveland contends (Pet. 10-13) that the instant decision conflicts with holdings of other courts of appeals that particular licenses, especially unissued licenses, did not constitute property under the mail fraud statute. Although the Fifth Circuit in *Salvatore* criticized reasoning in some of those cases that an unissued license cannot be property even though an issued license can be, 110 F.3d at 1140-1141, it ultimately explained that "video poker licenses are different than other types of licenses," *id.* at 1142 n.2, because of the "character of the licenses themselves," *id.* at 1141. Because of the distinct characteristics of Louisiana's video poker license, the holding here is distinguishable from decisions of other courts of appeals

that have reversed mail fraud convictions on the ground that various types of licenses were not property. See, *e.g.*, *United States* v. *Schwartz*, 924 F.2d 410, 417-418 (2d Cir. 1991) (arms export license); *United States* v. *Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (school bus operator's permit), cert. denied, 500 U.S. 921 (1991); *United States* v. *Kato*, 878 F.2d 267, 268-269 (9th Cir. 1989) (private pilot's license); *Toulabi* v. *United States*, 875 F.2d 122, 125 (7th Cir. 1989) (taxi driver's license); *United States* v. *Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988) (gambling license); *United States* v. *Murphy*, 836 F.2d 248, 254 (6th Cir.) (bingo license), cert. denied, 488 U.S. 924 (1988).

As the *Salvatore* court explained, those cases rest on the theory that, in the manner in which particular licenses operated in the States that had issued them, the licenses did not represent property to the issuing governments. Rather, under the reasoning of those cases, "the issuance of a license is nothing more than a physical manifestation of the government's intent to regulate." 110 F.3d at 1141. The *Salvatore* court "agree[d], as an initial matter, that the right to regulate a particular industry does not *a fortiori* give the regulator a property interest in licenses signifying the government's regulation." *Ibid.* With respect to video poker licenses, however, the State "has a direct and significant financial stake in its role as issuer of the licenses" because it receives an "up-front fee" for the license and a significant percentage of net revenues as a franchise fee. *Id.* at 1142. The *Salvatore* court noted that Louisiana fully expected to receive continuing funds from the video poker license (22.5% of the licensee's net revenues), such that the license "evinces the State's intent to participate in the industry." *Ibid.* The entitlement to control the sources of future re-

venue gave the State a continuing property interest in the license.

The cases on which petitioner Cleveland (Pet. 11-13) relies involve licenses that lack that revenue-producing feature. See *United States* v. *Shotts*, 145 F.3d 1289, 1294-1295 (11th Cir. 1998) (no indication of continuing government financial stake in bail bond license), cert. denied, 119 S. Ct. 1111 (1999); *United States* v. *Paccione*, 949 F.2d 1183, 1186-1187 (2d Cir. 1991) (same for medical waste dumping permit), cert. denied, 505 U.S. 1220 (1992); *Granberry*, 908 F.2d at 280 (same for bus license); *Kato*, 879 F.2d at 269 (same for pilot's license); *Toulabi*, 875 F.2d at 126 (same for taxi driver license); *Dadanian*, 856 F.2d at 1392 (same for poker club license); *Murphy*, 836 F.2d at 250-254 (same for bingo license). Accordingly, none of those cases conflicts with the holding that Louisiana video poker licenses represent a government property right protected by the mail fraud statute.[3]

2. Relying on *Neder* v. *United States*, 119 S. Ct. 1827 (1999), petitioners contend (Pet. 21-25; 99-939 Pet. 10-11) that the district court committed plain error in failing to instruct the jury that a falsehood charged in a mail fraud offense must be found to be material.[4] The court of appeals correctly declined to address that

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[3] We note that the petition for a writ of certiorari in *Salvatore*, which this Court denied, 522 U.S. 981 (1997), raised precisely the same claim that petitioners raise here. The only decision cited by petitioners that was decided since this Court denied certiorari in *Salvatore* is *United States* v. *Shotts*, 145 F.3d 1289 (11th Cir. 1998), cert. denied, 119 S. Ct. 1111 (1999), and that case is readily distinguishable for the reasons given in the text.

[4] Petitioners invoke the plain error standard of review in light of their failure to request a materiality instruction at trial. See Pet. 25 n.20; 99-939 Pet. 10 n.5.

claim, since petitioners sought to raise it for the first time in a supplemental brief filed eight days before the court issued its decision. It is well settled that a defendant waives appellate consideration of an issue raised for the first time in a reply or later supplemental brief. See, *e.g.*, *Dunham* v. *Kisak*, 192 F.3d 1104, 1110 (7th Cir. 1999); *United States* v. *Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 759 (6th Cir. 1999); *Orsini* v. *Wallace*, 913 F.2d 474, 476 n.2 (8th Cir. 1990), cert. denied, 498 U.S. 1128 (1991). Petitioners are not relieved from their waiver because *Neder* was decided after oral argument in the court of appeals. At the time the petitioners filed their initial brief on appeal, there was a clear-cut conflict in the circuits on whether the materiality of a charged falsehood is an element of mail or wire fraud. Compare, *e.g.*, *United States* v. *Slaughter*, 128 F.3d 623, 629 (8th Cir. 1997); *United States* v. *Cochran*, 109 F.3d 660, 667 n.3 (10th Cir. 1997) (materiality not an element), with *United States* v. *Rodriguez*, 140 F.3d 163, 167 (2d Cir. 1998); *United States* v. *DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998) (materiality is an element). Indeed, contrary to petitioner Cleveland's contention (Pet. 21), the issue was an open one in the Fifth Circuit. See *United States* v. *Moser*, 123 F.3d 813, 825-827 (5th Cir.), cert. denied, 522 U.S. 1035 (1997). In light of that waiver, petitioners have not properly preserved that issue for consideration by this Court.[5]

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[5] Petitioner Cleveland cites (Pet. 22) several cases in which this Court has granted the petition for certiorari, vacated the decision below, and remanded for further consideration in light of intervening authority. In each of those cases, however, the intervening authority had a crucial bearing on an issue timely raised on direct appeal and addressed by the appellate court.

In any event, petitioners' claim is without merit because the district court did give an adequate materiality instruction in connection with the mail fraud counts. The theory of the government's case was that, in documents filed with the State, petitioners concealed their ownership interests in TSG, Ltd., and other information to avoid the State's suitability assessment. The court instructed the jury that, in order to constitute a scheme to defraud, an omission must be "reasonably calculated to deceive persons of ordinary prudence and comprehension" and that it must "conceal[] a *material* fact." R. App. 4407 (emphasis added). The jury was thus instructed that it could find petitioners guilty of mail fraud based only on concealment of material information.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 99-804

IN THE
Supreme Court of the United States

CARL W. CLEVELAND,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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1. *Carpenter v. United States Does Not Support the Decision Below.*

In arguing that the Court of Appeals correctly decided the "property" issue, the government relies upon *Carpenter v. United States*, 484 U.S. 19 (1987). Br. Opp. 6-7. According to the government, "the State of Louisiana had a property interest in the unissued video poker licenses similar to the *Wall Street Journal*'s interest in maintaining the confidentiality of its business information." *Id.* 7. But this Court's opinion in *Carpenter* stressed that "Confidential business information has long been recognized

as property." 484 U.S. at 26. In support the Court cited four of its own decisions and a treatise on corporations; together those authorities demonstrated that since the early 1900s it had been established that confidential business information is a form of property. *See id.*[1]

In contrast, unissued licenses have never been considered property. That is confirmed by the government's Brief in Opposition: the sole authority cited as purportedly showing that an unissued license is property is *United States v. Martinez*, 905 F.2d 709 (3d Cir.), *cert. denied*, 498 U.S. 1017 (1990). Br. Opp. 7. There, the Third Circuit held that an unissued medical license was property of the Commonwealth of Pennsylvania under the mail fraud statute. But the only alleged support for that holding that the Third Circuit could find in the law of property was Professor Charles Reich's article *The New Property*, 73 YALE L. J. 733, 778 (1964), which opined that a license "is originally public property." *See Martinez*, 905 F.2d at 714. Plainly, there is an enormous difference between applying the mail fraud statute to what "has long been recognized as property," *Carpenter*, 484 U.S. at 26, and applying it to an interest treated as property only in a single law review article. *Carpenter* therefore does not support the government's position.

2. There Is a Conflict Among the Circuits.

Although the Court of Appeals acknowledged that "at the time of the charged conduct, a circuit split existed as to whether or not unissued licenses constituted property for purposes of the mail fraud statute," A. 20a, the government now argues, in effect, that the Court of Appeals

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[1] *See also United States v. Evans*, 844 F.2d 36, 41 (2d Cir. 1988) (noting that in *Carpenter* "the court pointed out that the right in quesion there—exclusive use of confidential business information—was recognized in various contexts").

erred in referring to a circuit slit. Br. Opp. 7-9. To a large extent, however, the conflict identified in the petition has not been disputed by the government. The government makes no attempt to reconcile the First and Third Circuit decisions in *United States v. Bucuvalas*, 970 F.2d 937 (1st Cir. 1992), *cert. denied*, 507 U.S. 959 (1993), and *Martinez* with the decisions of the many Circuits which have concluded that unissued licenses are not property.

Moreover, although the government does contend that *United States v. Salvatore*, 110 F.3d 1131 (5th Cir.), *cert. denied*, 522 U.S. 981 (1997), is distinguishable from the cases holding that unissued licenses are not property, its asserted distinctions focus on features of video poker operations in Louisiana that have no apparent bearing on whether unissued video poker licenses are property. Thus, the government stresses that applicants for video poker licenses pay an up-front licensing fee. Br. Opp. 8. But applicants for a wide variety of licenses must pay a fee in advance. *See, e.g., Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989). There is nothing unusual about requiring payment of a fee prior to issuance of a license. The government also stresses that device owners are required to remit to the State a significant percentage of the revenues from video poker operations. Br. Opp. 8. Again, however, that the State stands to receive a benefit from the activities permitted by an issued video poker license, through receipt of a percentage of the revenues generated by the licensee's operations, hardly suggests that the State is deprived of property when it issues the license.

It remains the case that the "legislative purpose" of the video poker law was "to provide a comprehensive framework for the *regulation* of the video poker industry, vesting regulatory powers exclusively in the video gaming

division of the state police." *Southwest Gaming Servs. v. Caddo-Shreveport Sales & Use Tax Comm'n*, 661 So.2d 662, 663 (La. Ct. App. 1995) (emphasis added). Nothing in the statute or its legislative history suggests a legislative intent to give the State a property interest in video poker licenses. Indeed, whereas in *Bucuvalas* and *Martinez* the courts at least could point to the fact that, once issued, the licenses in question were property,[2] the Fifth Circuit's holding in *Salvatore* came in the face of an express statutory provision that even an issued video poker license "is not property or a protected interest under the constitutions of either the United States or the state of Louisiana." La. Rev. Stat. Ann. § 33:4862.1(D) (recodified at La. Rev. Stat. Ann. § 27:301(D)). There can be little question that the result in *Salvatore* would have been different had the Fifth Circuit not specifically rejected the distinction—which has been embraced by numerous other Circuits—between issued and unissued licenses.[3]

3. Petitioner's Argument Under *Neder* Was Not Waived.

The government concedes that the Court of Appeals did not consider this Court's ruling in *Neder v. United States*, 119 S. Ct. 1827 (1999), that materiality of falsehood is an element of mail fraud. *See* Br. Opp. 9-10. It nevertheless opposes a remand for consideration of *Neder*, contending that "a defendant waives appellate consideration of an issue raised for the first time in a reply or later supplemental brief." *Id.* 10. The government asserts that, in opposing petitioner's motion for supplemental briefing, it argued to the Court of Appeals that "the issue had been waived." *Id.* 5. The government's description of what it argued below is incorrect, and its claim of waiver is untenable.

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[2] *See Bucuvalas*, 970 F.2d at 945; *Martinez*, 905 F.2d at 712, 715.

[3] *See Salvatore*, 110 F.3d at 1140.

The government did not argue below that petitioner had waived *appellate* consideration of the materiality issue by not raising it earlier in the Court of Appeals. Instead, it argued that *Neder* is distinguishable because *at trial*, unlike the defendant in that case, the defendants here had not requested an instruction on materiality.[4] Of course, the absence of such a request would not preclude review for plain error under Fed. R. Crim. P. 52(b). The government also contended, as it does in this Court, that portions of the jury charge as given effectively conveyed a requirement of materiality.[5]

The government had good reason not to argue below that petitioner had waived appellate consideration of materiality: case law in the Fifth Circuit and elsewhere makes clear that, although appellate review generally is waived as to issues not raised in the appellant's opening brief, that rule is inapplicable where, as here, there is a subsequent change in controlling authority.[6] *Neder* was not decided until June 10, 1999, almost a year after petitioner filed his opening brief on appeal, and three months after the Court of Appeals heard oral argument.

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[4] *See* Government-Appellee and Cross-Appellant's Opposition to Motion To Allow Supplemental Briefing Concerning the Recent Decision in *Neder v. United States* by the United States Supreme Court (filed July 8, 1999) at 2-3.

[5] *Compare id.* at 3 *with* Br. Opp. 11.

[6] *See, e.g., DSC Communications Corp. v. Next Level Communications*, 107 F.3d 322, 326 n.2 (5th Cir. 1997); *United States v. McGuire*, 79 F.3d 1396, *vacated on reh'g en banc*, 99 F.3d 671 (5th Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997); *Alberti v. Sheriff of Harris County*, 937 F.2d 984, 992-93, 998 (5th Cir. 1991), *cert. denied sub nom. Richards v. Lindsay*, 504 U.S. 930 (1992); *Nations v. Sun Oil Co.*, 695 F.2d 933, 936 (5th Cir.), *cert. denied*, 464 U.S. 893 (1983); *see also United States v. Sterner*, 23 F.3d 250, 252 n.3 (9th Cir. 1994); *DeGurules v. INS*, 833 F.2d 861, 864 (9th Cir. 1987).

At the time petitioner's opening brief was filed, petitioner had no viable issue to raise regarding the district court's failure to instruct that materiality is an element of mail fraud. The Fifth Circuit had expressly held that "Materiality and reliance . . . are *not* elements of either wire fraud or mail fraud." *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1129 (5th Cir. 1988), *vacated on other grounds sub nom. Fryar v. Abell*, 492 U.S. 914, *and cert. denied*, 492 U.S. 918 (1989) (emphasis in original). *See also* Pet. Cert. 21 n.17.[7]

The government suggests that petitioner nonetheless should have raised the materiality issue in his opening brief, because there was then a conflict among the circuits on whether materiality is an element of mail or wire fraud. Br. Opp. 10. But because no instruction on materiality was requested at trial, review was available only under the plain error standard of Rule 52(b). It is settled law that "a court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is *clear under current law*." *United States v. Olano*, 507 U.S. 725, 734 (1993) (emphasis added). At the time petitioner's opening brief was filed, any contention that the failure to instruct on materiality was clear error under current law would have been frivolous in light of *Abell*. When this Court's decision in *Neder* later provided support for such

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[7] Citing *United States v. Moser*, 123 F.3d 813 (5th Cir.), *cert. denied*, 522 U.S. 1035 (1997), the government asserts that the materiality issue was "an open one" in the Fifth Circuit at the time of petitioner's appeal. Br. Opp. 10. The government has misread *Moser*. In that case, the Fifth Circuit simply "assume[d] for purposes of this appeal" that materiality was an element of mail fraud, and then ruled against the defendants on other grounds. 123 F.3d at 826-27. In doing so, the court pointed out that the Fifth Circuit had previously held in *Abell* that "materiality is not an element of mail fraud." *Id.* at 826.

a contention, petitioner promptly moved for leave to file a supplemental brief.

The government's alternative argument is that the district court "did give an adequate materiality instruction." Br. Opp. 11. The record demonstrates otherwise. The court instructed the jury that the requisite scheme to defraud had to involve "false *or* fraudulent representations *or* omissions." R. 4407 (emphasis added). The court's passing reference to "material fact" ("a representation may be 'false' when it constitutes a half truth, or effectively conceals a material fact," *id.*) by its own terms concerned only one possible means of proving the alleged scheme—through "false" representations, as opposed to fraudulent representations or fraudulent omissions. It is impossible to know on what theory the jury based its verdict. Even as to false representations, the court did not say proof of materiality was essential, and the term "material" was wholly unexplained.

The government also cites the instruction that "the scheme must involve false or fraudulent representations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." R. 4407. But that instruction does not concern materiality at all, as the government itself pointed out in its brief in *Neder*. *See* Brief for the United States at 47 n.27, *Neder v. United States*, No. 97-1985 ("Although the weight of authority supports the conclusion that it is no defense to a charge of mail fraud that the scheme at issue would not have deceived a reasonably prudent person, some courts of appeals have erroneously espoused the contrary view. . . . The disagreement among the courts of appeals, however, *does not in reality involve a question of materiality* . . . .") (emphasis added).

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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QUESTION PRESENTED

Can alleged false statements or omissions in applications for state licenses be the basis for federal mail or wire fraud charges, on the theory that a State is deprived of "property" when it issues a license?

LIST OF PARTIES

Petitioner Carl W. Cleveland was a defendant in the District Court and an appellant in the Court of Appeals. Respondent, who was plaintiff in the District Court and appellee and cross-appellant in the Court of Appeals, is the United States. Also defendants in the District Court and appellants in the Court of Appeals were Fred H. Goodson, Maria Goodson, and Larry S. Bankston. In addition, Mr. Bankston and Ms. Goodson were cross-appellees. Intervenors in the forfeiture proceedings in the District Court and appellants in the Court of Appeals were Maria Goodson, Alexandros F. Goodson, and Truck Stop Gaming, Inc.

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OPINIONS BELOW

The opinion of the District Court is reported at 951 F. Supp. 1249 and is reproduced in the Appendix to the Petition for Certiorari ("Pet. App.") at 52a. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 182 F.3d 296 and is reproduced at Pet. App. 1a.

JURISDICTION

The judgment of the District Court was entered on October 20, 1997. R.[1] 8614. The judgment of the Court of Appeals was entered on July 21, 1999. Pet. App. 1a. Petitioner's timely petition for rehearing was denied on September 2, 1999. Pet. App. 45a. The petition for certiorari was filed on November 9, 1999. The petition was granted on March 20, 2000 as to the question now presented in this brief. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal mail fraud statute, 18 U.S.C. § 1341, and pertinent parts of the Louisiana video poker statute, La. Rev. Stat. Ann. §§ 33:4862.1(D), :4862.6(A), :4862.8, :4862.9, :4862.10 & :4862.11 (West Supp. 1996), are reproduced at pages 1a-11a, *infra*.

STATEMENT

A. The Formation of Truck Stop Gaming.

In July 1991, the Louisiana legislature enacted a law allowing the operation of video poker machines at certain business establishments, including truck stops. *See* Video Draw Poker Devices Law, 1991 La. Sess. Law Serv. Act 1062 (West) (codified as amended at La. Rev. Stat. Ann. §§ 33:4862.1–4862.23 (West Supp. 1996)). Under regu-

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[1] "R." denotes the Record in the Court of Appeals, "T." the trial transcript, "GX" a Government exhibit, and "CX" a Cleveland exhibit.

lations issued shortly thereafter, each truck stop was limited to 50 machines. *See* La. Admin. Code, tit. 55, § 2415(A)(1)(e)(i) (1992).

Fred Goodson had been in the truck stop business in Slidell, Louisiana for 20 years. *See* Pet. App. 2a. In February 1992, with the help of a New Orleans law firm, Cleveland, Barrios, Kingsdorf & Casteix, Fred Goodson's family formed a limited partnership, Truck Stop Gaming, Ltd. ("Truck Stop Gaming"), that would operate video poker machines at the Slidell truck stop and other truck stops. *See id.* The law firm had represented Fred Goodson in litigation matters since 1989 (and would continue to do so); those matters had been handled by petitioner Carl Cleveland, a trial lawyer who had practiced law in New Orleans since 1966. T. 4040-41, 4065-66. Cleveland asked one of his partners, a corporate lawyer, to prepare the documents necessary to form Truck Stop Gaming. T. 4083-84; GX 2A.

As he had done with two other family businesses, T. 3532, 3535-36, Fred Goodson made his adult children, Alex and Maria Goodson, the owners of Truck Stop Gaming, while he retained control over its operations. The legal entity used to accomplish these purposes was a partnership *in commendam,* a form of limited partnership under Louisiana law. *See* Pet. App. 2a. Alex and Maria were the limited partners of Truck Stop Gaming.[2] *See id.* In 1992 Maria was 23 years old and a student at Tulane University. GX 5. Her brother Alex was 28 years old and managed a Hardee's fast-food restaurant owned and operated by the Goodsons as a family business. *Id.* After Maria and Alex signed the partnership agreement

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[2] In that capacity, Alex Goodson and Maria Goodson each held a 49% ownership interest. GX 2A. The general partner of Truck Stop Gaming, holding a 2% ownership interest, was a corporation of which Maria and Alex were the sole shareholders. GX 1, 2A. Fred Goodson was the General Manager of the partnership. GX 5.

establishing Truck Stop Gaming, the agreement was filed with the Secretary of State as required by Louisiana law. *See* Pet. App. 3a.

The start-up capital that Alex and Maria Goodson invested in the new partnership was provided to them in two loans of $245,000.[3] One loan was from Fred Goodson to Alex Goodson, and the other from the law firm to Maria Goodson. GX 5; *see* Pet. App. 3a. When the law firm made its loan to Maria Goodson, Cleveland and Fred Goodson discussed the possibility that, if things worked out to the satisfaction of the Goodson family, and if partners of the law firm wanted to do it, at some point the loan, accrued interest, and any accrued legal fees might be converted to an ownership interest in Truck Stop Gaming. T. 4085; *see also* T. 1273-74, 3788, 4006.

B. The License Applications.

The new Louisiana video poker statute required prospective owners of video poker devices to obtain licenses from the Louisiana State Police. *See* La. Rev. Stat. Ann. § 33: 4862.6 (West Supp. 1996). A prospective device owner was required to complete a license application and await the approval of the State Police. *See* La. Admin. Code, tit. 55, § 2405 (1992). All licenses expired on June 30 of each year and had to be renewed to remain valid. *See id.*, § 2405(A). Licenses were not transferable. *See* La. Rev. Stat. Ann. § 33:4862.11(G) (West. Supp. 1996). Each device owner was required to pay the State $2,000 per year and 22.5% of the net revenue generated by the owner's video poker machines. *See* La. Rev. Stat. Ann. § 4862.11(A), (D) (West. Supp. 1996).

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[3] The corporate general partner of Truck Stop Gaming received an additional $10,000 loan from Fred Goodson.

In February 1992, Truck Stop Gaming applied for its initial device owner license. GX 5. In accordance with the terms of the agreement establishing the partnership *in commendam*, the application identified Alex Goodson, Maria Goodson, and the corporate general partner, *see* note 2, *supra*, as the owners of Truck Stop Gaming. GX 5. As the Court of Appeals noted, "Alex and Maria Goodson were from inception and remain the record owners of [Truck Stop Gaming] and its corporate general partner . . . ." Pet. App. 5a.[4] The applications fully disclosed that all the start-up capital for the partnership had been provided in loans from Fred Goodson and the law firm to Alex and Maria Goodson. *See* Pet. App. 3a; GX 5. Alex and Maria Goodson signed the State's form affidavits attesting, *inter alia*, that they had no agreements or understandings with any other person to hold their interests as agents, nominees, or otherwise. GX 5.

In May 1992, the State Police approved Truck Stop Gaming's application and issued its initial license. GX 6. Truck Stop Gaming submitted renewal applications in 1993, 1994, and 1995, and its license was renewed each time. GX 7-10, 41, 45. Truck Stop Gaming owned and operated video poker machines from 1993 through 1995 and paid the State of Louisiana, as required by law, 22.5% of the net revenue generated by the machines. T. 1017-18, 3800; R. 7911.

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[4] Under the terms of Truck Stop Gaming's partnership agreement, any transfer of ownership was required to be in writing. T. 3435; GX 2A. No such writing reflecting a transfer of ownership to Fred Goodson, Cleveland, or the law firm was ever prepared or executed. T. 2004-05, 2212-13.

C. The Indictment and the Proceedings in the District Court.

The State of Louisiana has never brought any criminal charges based on the submission of any of Truck Stop Gaming's license applications. In 1996, however, the Federal Government made those same applications the linchpin of a multi-count indictment against petitioner and others. R. 416-60.

In four counts of mail fraud, the indictment charged that petitioner, Fred Goodson, and Maria Goodson had executed a scheme to deprive "the State of Louisiana and its citizens" of "property" by "fraudulently obtaining and renewing, through the submission of false and incomplete information, state licenses to operate video poker sites." R. 441.[5] The license applications allegedly failed to disclose "understandings and agreements with unreported parties" and "other factors that could impact the ability of the true owners to obtain licenses." R. 441-42. The mailings underlying the four mail fraud counts were the mailings by the State Police of Truck Stop Gaming's initial license in 1992 and its licenses for 1993, 1994, and 1995. R. 442-43.

The mail fraud charges were the springboard for adding other charges carrying much longer potential sentences. The indictment charged petitioner with five counts of money laundering based on transactions involving proceeds of the alleged mail fraud. R. 444-46. The alleged mail fraud and money laundering, in turn, were identified as predicate acts of racketeering to support RICO and RICO conspiracy counts. R. 422-23. In all, 11 of the 15 counts against petitioner were based in whole or in part on the mail fraud statute.

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[5] An additional defendant, Joe Morgan, an accountant for the Goodson family businesses, was named in two of the mail fraud counts. R. 443. Morgan was acquitted on all counts. R. 95.

The Government also brought a separate charge under 18 U.S.C. § 1955 of conducting an illegal gambling business from April 1993 to July 1995 (on which petitioner was acquitted). R. 443. According to the Government, Truck Stop Gaming's video poker business was illegal under state law–which is an essential element of an offense under § 1955–because the license applications were fraudulent. T. 4503. Thus, the illegal gambling and mail fraud counts rested on virtually identical challenges to the license applications.

On November 15, 1996, Fred Goodson moved to dismiss the mail fraud counts and the corresponding alleged predicate acts of racketeering on the ground that an unissued state license does not constitute property under the mail fraud statute, as a majority of the circuits to consider the question had held. R. 300. Petitioner adopted the motion. R. 285. On January 14, 1997, the District Court denied the motion, stating that "This Court agrees with the First and Third Circuit's conclusion that licenses constitute property even before they are issued." A. 79a. *See also id.* (citing *United States v. Berg*, 710 F. Supp. 438, 444 (E.D.N.Y. 1989) (unissued licenses constitute property), *aff'd in part, rev'd in relevant part sub nom. United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991)).

At trial, the Government advanced four contradictory theories in support of its contention that the license applications were false: (1) Cleveland and Fred Goodson (not Maria and Alex Goodson) owned Truck Stop Gaming, T. 358, 376, 378, 380, 399, 4495-97, 4682, 4685; (2) Maria and Alex Goodson had pledged their ownership interests to Cleveland and Fred Goodson, T. 1052, 2210-11, 2220, 4024, 4166-67, 4170-71, 4682, 4685-86, which assumes—contrary to the first theory—that Maria and Alex Goodson owned Truck Stop Gaming; (3) Cleveland and Fred Goodson held options to acquire from Maria and Alex Goodson the interests that, according to the first theory, Cleveland and Fred

Goodson already owned, T. 923, 2220, 4502, 4682; and (4) Maria and Alex Goodson were parties to agreements or understandings to transfer their ownership interests to Cleveland and Fred Goodson in the future. T. 4500.[6]

The Government contended that Cleveland *personally* held an interest in Truck Stop Gaming. T. 378, 4682, 4685-86. But the only discussions concerning possible acquisition of Maria Goodson's ownership interest had concerned acquisition of that interest by the Cleveland, Barrios, Kingsdorf & Casteix law firm, not by Cleveland personally. T. 4096; CX 1, 4; GX 106. Cleveland held only a 25% interest in the firm. It was the law firm—a partnership and a distinct legal entity under Louisiana law—that had loaned Maria Goodson $245,000 and was providing legal services for Fred Goodson. GX 5; T. 3579, 4065.

The Government asserted that Alex and Maria Goodson were identified on the license applications as owners of Truck Stop Gaming so that the State Police would not conduct suitability investigations of Fred Goodson and Cleveland, who purportedly feared they would be found financially unsuitable. T. 355-56, 375-76, 4496, 4680-81. The applications fully disclosed, however, that the start-up capital for the new video poker business had been provided in loans from the law firm and Fred Goodson, and that the loans were outstanding. GX 5; *see* Pet. App. 3a. The very reason for requiring disclosure of loans on applications for video poker licenses was "for the purposes of determining significant influence and suitability." La. Rev. Stat. Ann. § 33:4862.10(E) (West Supp. 1996). Lenders as well as

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[6] At times the Government advanced several of its contradictory theories *seriatim*. For example, in its rebuttal summation the Government argued that "They didn't report these pledges. They didn't report these options that they had. The bottom line is Fred and Carl owned this company . . . ." T. 4682.

owners were subject to a suitability investigation if the State Police chose to conduct one. T. 957-58, 1004, 1011. Indeed, the State Police did investigate Fred Goodson, T. 1006-07, 1024, and must have found him to be suitable because it issued the licenses.

The jury deliberated for seven days. All defendants were acquitted on the illegal gambling count and two mail fraud counts (based on the license issued in 1992 and the 1993 renewal). R. 90-91.[7] Petitioner was found guilty, however, on the other two mail fraud counts (based on the renewal licenses issued in 1994 and 1995), four money laundering counts, and the RICO and RICO conspiracy counts. R. 90-91.[8] The convictions for money laundering, RICO, and RICO conspiracy all depended on the allegations of mail fraud.

Applying the guideline range for money laundering, the District Court sentenced petitioner, who until this case had never been charged with a crime, to ten years and one month in prison. R. 8614.[9]

D. The Court of Appeals' Ruling.

On appeal, petitioner renewed his contention that an unissued state license is not property under the mail fraud statute. *See* Pet. App. 19a. On July 21, 1999, the Court of

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[7] Petitioner also was acquitted on a charge of participating in or causing interstate communications in aid of racketeering (18 U.S.C. § 1952). R. 91.

[8] Petitioner also was convicted on two tax charges under 18 U.S.C. § 371 and 26 U.S.C. § 7206, R. 91, based on an income tax return filed by Truck Stop Gaming. Those charges had no effect on the length of petitioner's sentence.

[9] Petitioner was denied bail pending appeal and has served 28 months of his sentence. After certiorari was granted, the District Court ordered petitioner released pending the completion of the appeal process, citing, *inter alia*, his "exemplary behavior record while incarcerated." Order and Reasons, April 27, 2000, at 3.

Appeals affirmed petitioner's conviction and sentence. *Id.* 1a. The court rejected petitioner's contention concerning unissued licenses, *id.* 19a, deeming itself bound by *United States v. Salvatore*, 110 F.3d 1131 (5th Cir.), *cert. denied*, 522 U.S. 981 (1997), in which a prior Fifth Circuit panel had held that unissued Louisiana video poker licenses constitute property of the State under 18 U.S.C. § 1341.

SUMMARY OF ARGUMENT

Petitioner Cleveland's mail fraud conviction rests upon an interpretation of the mail fraud statute, 18 U.S.C. § 1341, that is fundamentally inconsistent with this Court's decisions in *McNally v. United States*, 483 U.S. 350 (1987), and *Carpenter v. United States*, 484 U.S. 19 (1987). *McNally* held, and *Carpenter* reaffirmed, that § 1341 is limited to schemes aimed at taking money or property. In 1988 Congress extended the statute to schemes to deprive another of the intangible right of honest services, but otherwise left the money-or-property limitation intact. In this case, however, the Court of Appeals has allowed the Government to predicate mail fraud charges on an alleged scheme that implicated only a state regulatory interest, not money or property.

According to the decision that the Court of Appeals followed here, "Louisiana's right to choose the persons to whom it issues video poker licenses" is property, of which the State is deprived when it issues a license to an applicant who has submitted a false or misleading application. *Salvatore*, 110 F.3d at 1140. This interpretation of the mail fraud statute finds property where there is none. As the Eighth Circuit held in *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990) (R. Arnold, J.), *cert. denied*, 500 U.S. 921 (1991), "A governmental permit may in some sense be property in the hands of the person who receives it, but licensing authorities have no property interest in licenses or permits . . . ." 908

F.2d at 280. Licensing is a method of regulating conduct and raising revenue, not a means by which government property is relinquished. Whether or not a particular license, after it is issued, constitutes property of the licensee–and the Louisiana legislature has declared that a video poker license is not property of the licensee–the government plainly does not part with any of its own property when it issues a license. Nor is the right to select the person to whom the government issues a license property. "From the government's perspective, . . . the license is a promise not to interfere rather than a sliver of property." *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989).

The conclusion that a governmental entity is not deprived of property under the mail and wire fraud statutes when it issues a license is supported by decisions of the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits. *See, e.g., United States v. Schwartz*, 924 F.2d 410, 417 (2d Cir. 1991); *Granberry*, 908 F.2d at 280; *Toulabi*, 875 F.2d at 125. Those decisions involved a variety of licenses, from taxicab licenses to licenses to conduct bingo games. Moreover, the Fourth and Federal Circuits have held that government actions similar to the issuance of a license do not affect the government's interests as a property holder. *See Semiconductor Energy Lab. Co. v. Samsung Elecs. Co.*, 204 F.3d 1368, 1380 (Fed. Cir. 2000); *Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1137 (4th Cir. 1993), *cert. denied*, 510 U.S. 1197 (1994).

The majority view among the circuits is also consistent with the presumption against statutory interpretations that significantly change the balance between federal and state criminal jurisdiction. *See, e.g., Jones v. United States*, 68 U.S.L.W. 4422, 4425 (U.S. May 22, 2000); *United States v. Bass*, 404 U.S. 336, 349 (1971). There are thousands of state and municipal licensing requirements. Equating issuance of a license with a deprivation of property would greatly expand

federal criminal jurisdiction, and would make a wide range of conduct traditionally handled by state or local authorities subject to prosecution under the federal mail or wire fraud statutes.

The majority view in the circuits finds further support in the rule of lenity. Even if the arguments for treating issuance of a video poker license as a transfer of government property were deemed to create ambiguity as to whether the mail fraud statute applies, the rule of lenity would require that the ambiguity be resolved against the more expansive reading of the statute. *See, e.g., Jones*, 68 U.S.L.W. at 4425; *United States v. Granderson*, 511 U.S. 39, 54, 56 (1994); *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994).

Finally, the majority view is supported by the limited scope of the statute Congress enacted in 1988 in response to *McNally*. Prior to *McNally*, lower courts had recognized numerous "intangible rights," including the intangible right of a state agency to run a licensing program free from deception. In *McNally* this Court held that intangible rights not involving money or property cannot be the basis of a mail fraud charge. The following year, Congress restored to the mail fraud statute just a single intangible right, the intangible right of honest services. Congress declined to enact proposed laws that would have restored all or a long list of intangible rights, even though it was aware that indictments charging deception in license applications had been dismissed in reliance upon *McNally*. The only reasonable inference is that, apart from the intangible right of honest services, Congress did not intend mail fraud charges to be predicated on intangible rights, including the intangible right to administer a licensing program based on full and complete information. By treating the regulatory act of issuing a video poker license as a deprivation of property, the Court of Appeals has effectively read that intangible right into the mail fraud statute.

ARGUMENT

I. THE GOVERNMENT DOES NOT PART WITH PROPERTY WHEN IT ISSUES A LICENSE.

A. The Mail Fraud Statute Is Limited to Schemes Calculated To Deprive Another of Money, Property, or the Right of Honest Services.

The mail fraud statute was first enacted in 1872 as part of an omnibus act revising and recodifying the postal laws. Act of June 8, 1872, ch. 355, § 301, 17 Stat. 323. As originally worded, the statute prohibited using the mails in furtherance of "any scheme or artifice to defraud." The sponsor of the recodification, Representative Farnsworth, stated that measures were needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." Cong. Globe, 41st Cong., 3d Sess. 35 (1870). In 1909, as part of a general revision of the federal penal code, Congress amended the mail fraud statute by inserting the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" after "defraud," thereby codifying the holding of *Durland v. United States*, 161 U.S. 306 (1896).[10] Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. Insofar as is pertinent here, the statutory language has remained unchanged since 1909.

Hammerschmidt v. United States, 265 U.S. 182 (1924), was the first decision of this Court to recognize that the mail

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[10] In *Durland* this Court held that the phrase "any scheme or artifice to defraud" was not limited to those frauds satisfying the common law definition of false pretenses, which required "a misrepresentation as to some existing fact and not a mere promise as to the future." 161 U.S. at 312. The Court construed the phrase to encompass "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." *Id.* at 313.

fraud statute is limited to schemes that seek to take money or property. *Hammerschmidt* involved an indictment under the conspiracy-to-defraud clause of the predecessor of 18 U.S.C. § 371, but in its unanimous opinion the Court discussed the words "to defraud" in other statutes, including the mail fraud statute. Those words, the Court observed, "usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching. They do not extend to theft by violence. They refer rather to *wronging one in his property rights* by dishonest methods or schemes." 265 U.S. at 188 (emphasis added). The Court then referred to a lower court decision, *Horman v. United States*, 116 F. 350 (6th Cir.), *cert. denied*, 187 U.S. 641 (1902), which had affirmed a mail fraud conviction based on a letter conveying a threat to blackmail the recipient unless he paid the sender money. This Court stressed that "The decision . . . went to the verge and should be confined to *pecuniary or property injury* inflicted by a scheme to use the mails for the purpose." 265 U.S. at 188-89 (emphasis added). *See also United States v. Cohn*, 270 U.S. 339, 346-47 (1926) (construing word "defrauding" in predecessor of 18 U.S.C. § 1001 as "relating to the fraudulent causing of pecuniary or property loss").

More than 60 years later, the Court disapproved of lower court decisions upholding mail fraud convictions for schemes implicating "intangible rights," and specifically held that § 1341 is "limited in scope to the protection of property rights." *McNally v. United States*, 483 U.S. 350, 360 (1987). The Court also held that the money-or-property limitation applies with equal force when the government is the alleged target of a scheme to defraud. "[T]he mail fraud statute . . . had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute must be limited to the Government's interests as property holder." *Id.* at 359 n.8.

In a unanimous opinion the following Term, the Court reaffirmed that the scheme must be calculated to deprive the victim of money or property, but clarified that intangible as well as tangible property suffices. *See Carpenter v. United States*, 484 U.S. 19, 25-27 (1987). The Court held that the mail and wire fraud statutes prohibited a scheme to defraud the Wall Street Journal of confidential business information, because the "intangible nature" of such information "does not make it any less 'property' protected by the mail and wire fraud statutes." *Id.* at 25. The Court concluded that, because "Confidential business information has long been recognized as property," the convictions could stand. *Id.* at 26.

In 1988, the year after *McNally* and *Carpenter* were decided, Congress restored one, and only one, "intangible right" that had been recognized in the lower courts before *McNally*—the intangible right of honest services. It did so by providing that, for purposes of the chapter that includes the mail and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[11]

When a charge of mail or wire fraud does not allege a scheme to deprive another of the intangible right of honest services, *McNally* and *Carpenter* continue to require allegation and proof of conduct calculated to deprive the victim of money or property.[12] In this case, because the

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[11] Anti-Drug Abuse Act of 1988, Pub. L. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508 (Nov. 18, 1988) (codified at 18 U.S.C. § 1346).

[12] *See, e.g., United States v. Dinome*, 86 F.3d 277, 283 & n.5 (2d Cir. 1996); *United States v. Adler*, 186 F.3d 574, 576 (4th Cir. 1999); *Salvatore*, 110 F.3d at 1138-39; *Richards v. Combined Ins. Co. of Am.*, 55 F.3d 247, 251-52 (7th Cir. 1995); *United States v. F.J. Vollmer & Co.*, 1 F.3d 1511, 1520 (7th Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994); *United States v. Bruchhausen*, 977 F.2d 464, 467 & n.3 (9th Cir. 1992); *United States v. Shotts*, 145 F.3d 1289, 1292-93 & n.3 (11th Cir. 1998),

indictment did not allege a scheme to deprive the State of Louisiana of money or the intangible right of honest services, the validity of petitioner's mail fraud conviction depends upon whether the alleged scheme to obtain video poker licenses was one calculated to deprive the State of property.[13]

B. The Issuance of a License Is Not a Deprivation of Property.

The State of Louisiana issued the video poker licenses in this case pursuant to a statute enacted in 1991.[14] As one Louisiana court has explained, "The obvious legislative purpose behind [the video poker statute] was to provide a comprehensive framework for the regulation of the video poker industry, vesting regulatory powers exclusively in the video gaming division of the state police." *Southwest Gaming Servs. v. Caddo-Shreveport Sales & Use Tax*

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cert. denied, 525 U.S. 1177 (1999); *Semiconductor Energy Lab. Co. v. Samsung Elecs. Co.*, 204 F.3d 1368, 1380 & n.5 (Fed. Cir. 2000).

[13] In the decision upon which it relied here, the Court of Appeals analyzed the question whether the State parted with property under § 1341 as one of federal law, and did not interpret the statute as incorporating state property law. *See Salvatore*, 110 F.3d at 1142 ("Congress certainly could have defined property solely by reference to state law, but it chose not to do so in § 1341."). In this respect, the decision is consistent with this Court's precedents, which establish that "in the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law." *United States v. Turley*, 352 U.S. 407, 411 (1957); *see Jerome v. United States*, 318 U.S. 101, 104 (1943). Thus, in *Carpenter* the Court's conclusion that confidential business information "has long been recognized as property," 484 U.S. at 26, was based not on New York law, but on its own decisions, a statute, and a general treatise on private corporations. *See id.*

[14] *See* Video Draw Poker Devices Law, 1991 La. Sess. Law Serv. Act 1062 (West) (codified as amended at La. Rev. Stat. Ann. §§ 33:4862.1–4862.23 (West. Supp. 1996)). The current version of the statute appears at La. Rev. Stat. Ann. §§ 27:301–27:324 (West Supp. 2000).

Comm'n, 661 So. 2d 662, 663 (La. Ct. App. 1995), *cert. denied*, 666 So. 2d 294 (La. 1996). The Office of State Police, which is a part of the Department of Public Safety and Corrections, was assigned the responsibility to promulgate regulations concerning the licensing process, and the power to deny, condition, suspend, or revoke licenses; to levy fines of up to $1,000 per violation; and to inspect premises where video poker devices are offered for play. La. Rev. Stat. Ann. § 33:4862.8 (West Supp. 1996). A device owner was required to pay the State $2,000 per year and 22.5% of the net revenue from each device. La. Rev. Stat. Ann. § 33:4862.11(A), (D) (West Supp. 1996). In short, the statute "created an entire regulatory scheme pertaining to [video poker] devices[,] . . . gave extensive regulatory authority to the Department of Public Safety and Corrections, and provided for the payment of fees to the Department in connection with that regulatory scheme." La. Atty. Gen. Op. No. 92-491 (1992).[15]

In the decision upon which it relied in this case, the Court of Appeals held that the State was deprived of property by a scheme to obtain a video poker license through a false or incomplete application, because such a scheme affects "Louisiana's right to choose the persons to whom it issues video poker licenses." *Salvatore*, 110 F.3d at 1140. But the State's right to determine who may receive a license is an aspect of the State's regulatory powers. It is not a property right and therefore cannot support a mail fraud conviction.

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[15] The Department of Public Safety and Corrections is expressly identified as a "gaming industry regulator" in La. Rev. Stat. Ann. § 24:513.3(B)(2). The indictment here itself alleges that the State Police "regulated video poker gaming in the State of Louisiana." R. 418.

1. Licensing Is a Method of Regulating Conduct and Raising Revenue, Not of Transferring Government Property.

Licensing is one of the many techniques governments can use to regulate private conduct and raise revenue. As this Court said in *Wiggins Ferry Co. v. City of East St. Louis*, 107 U.S. 365 (1883), "The power to license is a police power, although it may also be exercised for the purposes of raising revenue." *Id.* at 373. The licensing power is a basic prerogative of government. "The power to regulate occupations and businesses by licensing provisions and by imposing a licensing fee is an attribute of sovereignty." *Newport Amusement Co. v. Maher*, 92 R.I. 51, 56, 166 A.2d 216, 218 (1960).

This Court has often recognized the regulatory nature of licensing. In *Gade v. National Solid Wastes Management Association,* 505 U.S. 88 (1992), the Court held that state licensing acts providing for licensing of hazardous waste site workers were preempted in part by the federal Occupational Safety and Health Act, because by imposing licensing requirements the acts regulated occupational health and safety. *Id.* at 108-09 (plurality opinion), 114 (Kennedy, J., concurring). The Court recognized the regulatory nature of another common form of licensing in *South Dakota v. Opperman*, 428 U.S. 364 (1976), where it observed that "Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements." *Id.* at 368.

That licensing entails the issuance of a piece of paper does not convert the government's regulatory action into a transfer of government property. As explained in *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991),

> the mere issuance of a document designed to formalize the government's regulation does not thereby create a property interest for the government.

> The government's interest in issuing its licenses ancillary to its regulatory program is no different than its interest in propounding and enforcing its other regulations with broad based applications that do not include the issuance of licenses. Whether it chooses to use licenses or blanket rules, the government's purpose is to control the private use of private property. Thus, a regulatory license is nothing more than a formal embodiment of "the necessary government approval."

Id. at 417 (quoting *United States v. Evans*, 844 F.2d 36, 37 (2d Cir. 1988)).

In some circumstances, and for some purposes, a license may constitute property in the hands of the *licensee*. But even when that is true, it does not follow that *the government* is deprived of property when it issues the license. As Judge Easterbrook wrote for the Seventh Circuit, in an opinion joined by Judge Posner,

> The license may be property from the [licensee's] perspective, in the sense that he may not be compelled to surrender the entitlement except on proof of wrongdoing. For constitutional purposes an entitlement depending on substantive criteria is "property." From the government's perspective, however, the license is a promise not to interfere rather than a sliver of property.

Toulabi v. United States, 875 F.2d 122, 125 (7th Cir. 1989) (citations omitted).[16] *Accord United States v. Shotts*, 145 F.3d 1289, 1296 (11th Cir. 1998) ("The right of due process prior to revocation of a license . . . exists only in the hands of the licensee. If this is property, it is not the state's property."), *cert. denied*, 525 U.S. 1177 (1999).

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[16] Judge Ripple also "join[ed] the basic reasoning" of the opinion and wrote separately solely to address a procedural issue not pertinent here. 875 F.2d at 126.

2. A Majority of the Circuits Have Held That the Government Does Not Part with Property When It Issues a License.

The great weight of authority in the lower courts confirms that a governmental entity is not deprived of property under the mail or wire fraud statutes when it issues a license. For example, the Second Circuit has ruled that the State Department did not part with property when it issued export licenses allowing shipment of ammunition and other arms to foreign purchasers, *United States v. Schwartz*, 924 F.2d 410, 417 (2d Cir. 1991), and that the State of New York was not deprived of property when it issued a waste transporter permit. *United States v. Paccione*, 949 F.2d 1183, 1197 (2d Cir. 1991), *cert. denied*, 505 U.S. 1220 (1992).[17]

In *United States v. Murphy*, 836 F.2d 248 (6th Cir.), *cert. denied*, 488 U.S. 924 (1988), the Sixth Circuit held that an allegedly false application for a license to conduct charitable bingo games could not be the basis of a mail fraud charge. The court concluded that "Tennessee's right to accurate information with respect to its issuance of bingo permits" was not a property interest and thus could not support the conviction. 836 F.2d at 254. Although the court noted that "the certificate of registration or the bingo license may well be 'property' once issued, insofar as the charitable organization is concerned," that was not enough because "certainly an unissued certificate of registration is not property of the State of Tennessee and once issued, it is not the property of the State of Tennessee." *Id.* at 253-54.

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[17] *See also Evans*, 844 F.2d at 38, 40-42 (Federal Government's right to prohibit a foreign country from transferring United States arms to another foreign country without the consent of the United States was not property under the mail and wire fraud statutes); *United States v. Ferrara*, 701 F. Supp. 39, 42 (E.D.N.Y.) (license to practice medicine was not property under mail fraud statute), *aff'd mem.*, 868 F.2d 1268 (2d Cir. 1988).

The Seventh Circuit reached a similar result in a case involving taxicab drivers' licenses. *Toulabi*, 875 F.2d 122. Toulabi had caused the City of Chicago to issue licenses to persons not entitled to receive them. *Id.* at 123. The Seventh Circuit set aside his conviction, holding that the City had not relinquished property when it issued the licenses. *Id.* at 125. The court emphasized that the defendant's conduct "did not deprive Chicago of property; it fattened the City's treasury by $50 (the license fee) for each extra license issued." *Id.* In a subsequent case, the Seventh Circuit rejected an attempt to predicate a mail fraud charge on a deprivation of the Bureau of Alcohol, Tobacco and Firearms' right to control the importation of firearms. *United States v. F.J. Vollmer & Co.*, 1 F.3d 1511 (7th Cir. 1993). The court held that, although "firearms cannot be imported without a license from BATF," the agency's right to control importation is "a regulatory interest," not a "property interest." *Id.* at 1520-21.

In *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990), *cert. denied*, 500 U.S. 921 (1991), the Eighth Circuit held that "licensing authorities have no property interest in licenses or permits, and allegations that they were obtained by fraud are not sufficient to state an offense under Section 1341." 908 F.2d at 280. Accordingly, the court ordered stricken from a mail fraud charge an allegation that the defendant caused the Missouri Department of Revenue to issue a school bus operator's permit based on false statements contained in a permit application. *Id.*[18]

The Ninth Circuit twice has held that the issuance of a license is not a deprivation of property. In *United States v. Dadanian*, 818 F.2d 1443 (9th Cir. 1987), *modified on rehearing*, 856 F.2d 1391 (9th Cir. 1988), the defendants

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[18]*See also Medical, Inc. v. Amgicor Ltd.*, 677 F. Supp. 1000, 1005 (D. Minn. 1988) ("[T]he FDA does not have a cognizable property interest under the mail fraud statute in granting export approval.").

were convicted of mail fraud based on their application to the City of Bell for a poker license. 818 F.2d at 1445. The Ninth Circuit reversed, holding that "the Dadanians' scheme to obtain the gambling license did not affect the City of Bell's interests as a property-holder." 856 F.2d at 1392. The court later held that a scheme to cause the Federal Aviation Administration to issue private pilot licenses "did not affect the government's interests as a property holder." *United States v. Kato*, 878 F.2d 267, 269 (9th Cir. 1989).

The Eleventh Circuit reached a similar conclusion in *United States v. Shotts*, 145 F.3d 1289. Agreeing with the Seventh Circuit that "from the government's perspective the license is 'a promise not to interfere rather than a sliver of property,'" the court ruled that "under Alabama law, a municipal license to operate a bail bonds business is not government property" and therefore cannot support a mail fraud charge. *Id.* at 1296-97 (quoting *Toulabi*, 875 F.2d at 125).

While not dealing with licenses *per se*, the Federal Circuit and the Fourth Circuit have issued decisions that are consistent with the foregoing authority. The Federal Circuit recently ruled that the United States Patent and Trademark Office ("PTO") does not lose "property" when it issues a patent. *Semiconductor Energy Lab. Co. v. Samsung Elecs. Co.*, 204 F.3d 1368 (Fed. Cir. 2000). An alleged patent infringer had brought civil RICO counterclaims against the patent holder, alleging that the latter committed mail fraud by obtaining a patent through "material misrepresentations to the PTO using the U.S. mail." *Id.* at 1379. The RICO counterclaims were properly dismissed, the Federal Circuit held, because the "PTO has not been defrauded of property." *Id.* at 1380. Although "'a patent is property,'" *id.* (quoting *Hartford-Empire Co. v. United States*, 323 U.S. 386, 415 (1945)), the challenged conduct "did not 'defraud' the government of any 'property' under either the federal mail or

wire fraud statutes." 204 F.3d at 1380. *See also Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1137 (4th Cir. 1993) (abbreviated new drug applications in the hands of the FDA and awaiting approval are not property of the government under the mail fraud statute), *cert. denied*, 510 U.S. 1197 (1994).

3. Absent a Clear Statement by Congress, a Statute Will Not Be Construed as Significantly Altering the Federal-State Balance.

"'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.'" *Jones v. United States*, 68 U.S.L.W. 4422, 4425 (U.S. May 22, 2000) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).[19] To allow mail or wire fraud charges to be brought whenever a state or municipal license was issued to someone who allegedly had submitted a deceptive application would dramatically expand the criminal jurisdiction of the federal government. Such an expansion would require a clear indication that Congress so intended, and there is none here.[20]

In our federal system, the "States possess primary authority for defining and enforcing the criminal law." *Brecht v.*

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[19] *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) ("'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" (quoting *Bass*, 404 U.S. at 349)); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) ("Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities . . . .").

[20] Indeed, the background and limited scope of the statute Congress enacted in response to *McNally* reflect an intent not to authorize use of the mail fraud statute against persons allegedly submitting false or misleading license applications. *See* Part II, *infra*.

Abrahamson, 507 U.S. 619, 635 (1993).[21] "When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and criminal jurisdiction." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (internal quotation marks omitted). Although Congress has broad power to create federal crimes,

> Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. This congressional policy is rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines. *See, e.g., Younger v. Harris*, 401 U.S. 37 (1971).

Bass, 404 U.S. at 349 (footnote omitted). Accordingly, this Court has emphasized that it "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.*[22]

Deception in applications for state or municipal licenses is a quintessential example of "conduct readily denounced as criminal by the States." *Id.* For example, under Louisiana law applicants for video poker licenses are subject to criminal penalties if they submit false statements in connection with their applications. La. Rev. Stat. Ann. § 33:4862.9(A) (West Supp. 1996); *see RCS Gaming, Inc. v. Louisiana Through the La. Gaming Control Bd.*, 705 So. 2d 1122 (La. Ct. App. 1997) (discussing state criminal prosecution for lying on

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[21] *See United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (same); *Kelly v. Robinson*, 479 U.S. 36, 47 (1986) ("The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States."); *Jerome v. United States*, 318 U.S. 101, 105-06 (1943).

[22] *See Jones*, 68 U.S.L.W. at 4425; *United States v. Enmons*, 410 U.S. 396, 411-12 (1973); *Rewis v. United States*, 401 U.S. 808, 811-12 (1971); *see also Williams v. United States*, 458 U.S. 279, 287 (1982).

applications for video poker licenses). In *Toulabi* Judge Easterbrook questioned why the federal mail fraud statute should be read to encompass conduct that clearly could be prosecuted under state or local laws: "Why the United States should be so interested in enforcing the laws of the City of Chicago is something of a mystery .... State and local governments commonly prosecute violations of their own laws . . . ." *Toulabi*, 875 F.2d at 123 (internal quotation marks omitted).

As Louisiana did when it directed the Office of State Police to regulate the video poker industry, *see* La. Rev. Stat. Ann. § 33:4862.8 (West Supp. 1996), States typically give the regulatory agency that runs a licensing program the power to impose administrative sanctions such as revocation and suspension. Presumptively, the sovereign that has responsibility for a licensing program should determine whether to seek sanctions based on a particular license application, and whether to use the administrative process to do so or instead to bring criminal charges. In the case of applications for state licenses, state officials are likely to be more knowledgeable of, and more sensitive to, the circumstances relevant to the choice of the appropriate sanction. State control of enforcement decisions also promotes state accountability.

Under the contrary view that issuance of a license can satisfy the requirement of a deprivation of money or property, an extremely broad range of conduct, which otherwise could not be prosecuted as a federal crime, would potentially become the subject of federal criminal charges. Approximately 600 occupations and professions are regulated by one or more states through licensure, and nearly 60 occupations and professions are regulated by more than half

the states.[23] "[I]n addition to the state laws there are municipal laws in abundance, not to mention the federal statutes that require the licensing of such diverse occupations as radio operators and stockyard commission agents."[24] It has been estimated that "as much as a third of the work force is directly affected by licensing laws."[25] Moreover, occupational licensing is only one form of licensing. Countless other activities, including driving a car, hunting, fishing, and building a home, require one or more licenses, permits, or other forms of governmental approval. In all likelihood, tens of thousands of license and permit applications are submitted every day in this country.

In the vast majority of cases, the submission, evaluation, or issuance of license applications involves the United States mail. In the unusual case where that is not true, some part of the licensing process likely will involve one or more telephone or facsimile communications. Therefore, to hold that a licensing authority parts with property under the mail and wire fraud statutes when it issues a license would allow a federal felony charge to be brought based on virtually any

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[23] *See* Pamela L. Brinegar and Kara L. Schmitt, *State Occupational and Professional Licensure*, in COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES: 1992-93 EDITION 567 (1992); *see also* COUNCIL OF STATE GOVERNMENTS, OCCUPATIONAL LICENSING LEGISLATION IN THE STATES 2, 7-8 (1952).

[24] WALTER GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 106 (1956) (footnote omitted); *see also* Walter Gellhorn, THE ABUSE OF OCCUPATIONAL LICENSING, 44 U. CHI. L. REV. 6, 6, 10 (1976) ("In recent decades occupational licensing has grown explosively."); Douglas A. Wallace, *Occupational Licensing and Certification: Remedies for Denial*, 14 WM. & MARY L. REV. 46, 46 (1972) ("In the past three to four decades, occupational licensing has become one of the most pervasive forms of state regulation of the economy.").

[25] S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA 14 (1987).

alleged deception in any state or local license application.[26] "'[I]t would require statutory language more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing'" applications for state and local licenses. *Williams v. United States*, 458 U.S. 279, 290 (1982) (quoting *United States v. Enmons*, 410 U.S. 396, 411 (1973)). There is no indication, let alone the requisite clear evidence, that Congress intended such a dramatic expansion of federal criminal jurisdiction.

C. The Court of Appeals' Ruling Incorrectly Treats a Regulatory Act as a Deprivation of Government Property.

In contrast to the majority of circuits, the Court of Appeals, in the decision it followed here, held that "Louisiana's right to choose the persons to whom it issues video poker licenses" is property under the mail fraud statute. *Salvatore*, 110 F.3d at 1140. The Third Circuit has likewise held that Pennsylvania's right to choose the persons to whom it issues medical licenses is property under the statute. *See United States v. Martinez*, 905 F.2d 709, 714 (3d Cir.), *cert. denied*, 498 U.S. 1017 (1990). *But see United States v. Allard*, 864 F.2d 248, 250-51 (1st Cir. 1989) (Breyer, Selya & Caffrey, JJ.) (observing that "*McNally* and *Carpenter* may raise questions concerning whether a medical license is property to the Commonwealth," and that "[t]he license may have no 'value' as such in the hands of the Commonwealth . . . .").[27]

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[26] The use of the mails or wires need not be an essential element of the scheme. *See Pereira v. United States*, 347 U.S. 1, 8 (1954). The defendants need not have mailed anything themselves. *See id.* And the material sent by mail or over the wires need not contain anything false or misleading. *See, e.g., Carpenter v. United States*, 484 U.S. 19, 28 (1987).

[27] *Cf. McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 793 (1st Cir.) (agreeing with the defendants' contention that the Air Traffic Conference and International Air Transport Association, in issuing

An examination of the Third and Fifth Circuit decisions shows that those courts incorrectly treated regulatory interests as property interests.

1. A principal premise of the Third and Fifth Circuit decisions was that "Under traditional property law, licensees have a protected property interest." *Salvatore*, 110 F.3d at 1143. *See also Martinez*, 905 F.2d at 713. Leaving aside for the moment the questions about the accuracy of the premise, in no event can that premise support the conclusion that the mail fraud statute applies to license applications. Whether or not a *licensee* has a property interest in a license after it has been issued, the question here is whether *the government* is deprived of property when it issues a license. *McNally* establishes that "any benefit which the Government derives from the statute must be limited to the Government's interests as property holder." 483 U.S. at 359 n.8.

The Third Circuit said it "saw no reason to make the esoteric distinction between an unissued and issued license," *Martinez*, 905 F.2d at 714, and the Fifth Circuit agreed. *Salvatore*, 110 F.3d at 1140. But this Court's decisions in *McNally* and in *Carpenter v. United States*, 484 U.S. 19 (1987), mandate an inquiry into whether the conduct charged was calculated to cause a deprivation of money or property.[28]

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approvals of contracts, were not deprived of property under the mail and wire fraud statutes, but at most were deprived of their interest in regulating the airline industry), *cert. denied*, 498 U.S. 992 (1990). In *United States v. Bucuvalas*, 970 F.2d 937 (1st Cir. 1992), *cert. denied*, 507 U.S. 959 (1993), a different panel of the First Circuit concluded that "the municipal government's interest in . . . alcoholic beverage and entertainment licenses was in the nature of a 'property' interest." 970 F.2d at 945.

[28] For example, in *United States v. Goodrich*, 891 F.2d 1011 (11th Cir. 1989), the court considered whether "the right of the citizens and government of Hillsborough County to have control over zoning decisions" is property under the mail fraud statute. *Id.* at 1015. In holding that it is not, the court distinguished between (i) a zoning decision by the

When an indictment alleges that the government was the target of the alleged scheme, those decisions require a determination of whether the scheme, if successful, would have deprived the government of money or property. Only if an indictment alleges that the holder of an issued license was the target is it necessary to determine whether the scheme, if successful, would have deprived the licensee of money or property.

It is not surprising that in some instances the outcome of these different inquiries might be different. As the Eleventh Circuit has noted, the distinction between issued and unissued licenses "seems quite clearly to be based upon the difference in the rights which attach to the license in the hands of the licensee." *Shotts*, 145 F.3d at 1296 n.13. *See also Toulabi*, 875 F.2d at 125. An issued license authorizes the licensee to engage in certain activity, which otherwise would be prohibited by law. An unissued license does not authorize the government to do anything. Nor is the government's "right to choose the persons to whom it issues . . . licenses," *Salvatore*, 110 F.3d at 1140, a property right.

Finally, the Fifth Circuit's assertion that "Under traditional property law, licensees have a protected property interest," *Salvatore*, 110 F.3d at 1143, mistakenly equates constitutional principles with traditional property law. The Fifth

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County and (ii) the rights of a property owner in conduct permitted by a zoning ordinance:

> Although the government points out that zoning decisions affect property and that arbitrary and capricious zoning decisions can constitute a deprivation of property without due process of law, . . . it does not follow that zoning decisions are themselves property. . . . Zoning classifications affect the use of property, but they are not, in themselves, property. The right to control zoning decisions also cannot be considered property.

Id.

Circuit relied upon *Mackey v. Montrym*, 443 U.S. 1, 10 (1979), *Beauchamp v. De Abadia*, 779 F.2d 773, 775 (1st Cir. 1985), and *Keney v. Derbyshire*, 718 F.2d 352, 354 (10th Cir.1983), but those decisions treated certain licenses as the licensee's property *for due process purposes*. That an interest is entitled to protection under the Due Process Clause does not mean it is property under "traditional property law." The seminal modern case expanding due process protections, *Goldberg v. Kelly*, 397 U.S. 254 (1967), did not make the existence *vel non* of a protected due process interest turn on traditional property law. Rather, the Court drew an "analogy . . . between social welfare and 'property.'" *Richardson v. Belcher*, 404 U.S. 78, 81 (1971).

Notwithstanding *Goldberg* and subsequent decisions under the Due Process Clause, even today for many purposes issued licenses, particularly business licenses, are not deemed property. *See, e.g., Club Misty, Inc. v. Laski*, 208 F.3d 615, 619 (7th Cir. 2000) (Posner, J.) ("For most purposes, perhaps for all but one purpose, an Illinois liquor license is not property; but insofar as it is revocable (or nonrenewable) only for cause, it is property for purposes of determining whether the state can deprive the licensee of it without according him due process of law."). In fact, the Louisiana video poker statute expressly provides that an issued video poker license is not property. As noted in *Montecino v. Louisiana*, 55 F. Supp. 2d 547 (E.D. La. 1999), a licensee's interest "in conducting video poker operations . . . has been declared by the legislature not to constitute a property interest." *Id.* at 552.[29]

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[29] *See* La. Rev. Stat. Ann. § 33:4862.1(D) (West Supp. 1996) ("Any license applied for, granted, or issued under the provisions of this Part is *a pure and absolute privilege*, and the awarding, denial, or withdrawal of which is solely within the discretion of the division and, except as provided in this Part, without recourse at law. Any license issued or renewed under the provisions of this Part *is not property* or a protected

2. The Third and Fifth Circuits also relied upon *Carpenter*, likening the government's right to control issuance of its licenses to the Wall Street Journal's right to control its confidential business information. The Fifth Circuit stated in *Salvatore*:

> [C]ourts define property as a legal "bundle of rights" that one possesses in connection with a particular object. Included in this bundle of property rights are the rights "to possess, use and dispose" of a particular article. *Necessarily encompassed within the right to use and dispose of an object is the right to control that object—and in the case of licenses, the right to control their issuance*. . . . Indeed, *Carpenter* itself supports the position that the right to control is included in the bundle of rights known as "property," for in that case the Supreme Court held that the defendants defrauded the Wall Street Journal of its right to control the disclosure of confidential business information.

110 F.3d at 1140 (citations omitted) (emphasis added). *See also Martinez*, 905 F.2d at 714-15.

Neither *Carpenter* nor the "bundle of rights" definition supports the court's conclusion that the State parts with property when it issues a license. *Carpenter* involved the taking of something (confidential business information) that "has long been recognized as property." *Carpenter*, 484 U.S.

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interest under the constitutions of either the United States or the state of Louisiana.") (emphasis added); *see also* La. Admin. Code, tit. 55, § 2405(D)(1) (1992) ("A license issued by the [Video Gaming] Division [of the Gaming Enforcement Section of the Office of State Police] is a pure and absolute privilege. The issuance, condition, denial, suspension or revocation of a license is at the discretion of the Division in accordance with the provisions of the Act. A license is not property or a protected interest under the Constitution of either the United States or the State of Louisiana."). There is no limit on the number of video poker licenses available; in contrast to, for example, radio licenses, applicants for video poker licenses are not competing against each other.

at 26. In contrast, apart from a minority of decisions under the mail and wire fraud statutes, courts have never recognized a state's right to control issuance of its licenses as property. To the contrary, licensing has long been recognized to be a method of regulating conduct and raising revenue. *See* pp. 17-18, *supra*.[30]

The Fifth Circuit's analysis also incorrectly assumes that a right to control is necessarily a property interest. The ownership of property may well confer on the owner "a bundle of rights," including the rights to possess, use, and dispose of the property, which in turn could be said to include the right to control the property. But it does not follow that every right of control, including the government's right to control to whom a license is issued, is a property right. *See United States v. F.J. Vollmer & Co.*, 1 F.3d 1511, 1520-21 (7th Cir. 1993) (holding that the Bureau of Alcohol, Tobacco and Firearms' right to control importation of firearms is "a regulatory interest," not a "property interest"); *United States v. Evans*, 844 F.2d 36, 41 (2d Cir. 1988) ("[T]he fact that the common law recognizes some rights to control alienation as property does not mean that all such rights are property rights within the meaning of the federal fraud statutes.").

3. In addition, the Third and Fifth Circuits relied upon a sentence in a law review article by Professor Charles Reich, which they cited for the proposition that a license "'is originally public property, comes from the state, and may be

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[30] *Cf. United States v. Bruchhausen*, 977 F.2d 464, 468 (9th Cir. 1992) ("*Carpenter* relied in part on the fact that '[c]onfidential business information has long been recognized as property.' There is no comparable understanding that a manufacturer has a property interest in the destination of its products. Of course the manufacturer may have an interest in assuring that its products are not ultimately shipped in violation of law, but that interest in the disposition of goods it no longer owns is not easily characterized as property.") (quoting *Carpenter*, 484 U.S. at 26) (citation omitted).

withheld completely.'"[31] For several reasons, Professor Reich's article provides no support for the courts' interpretation of the mail fraud statute. First, property for purposes of the mail fraud statute is "something that fairly deserves the label of property *under traditional usage*." *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (R. Arnold, J.) (emphasis added), *cert. denied*, 500 U.S. 921 (1991).[32] In *Carpenter* this Court cited case law, a statute, and a well-known treatise to demonstrate that confidential business information "has long been recognized as property." *Carpenter*, 484 U.S. at 26. A single sentence in a single law review article does not come close to showing that issuance of a license has traditionally been understood to be a transfer of the government's property. Second, for whatever the article may be worth, nowhere does it say that a license—as opposed to other forms of "largess" such as Social Security benefits, welfare, income from government jobs, and

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[31] *Salvatore*, 110 F.3d at 1141 (quoting Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 778 (1964)); *see also Martinez*, 905 F.2d at 715.

[32] *See also United States v. Bruchhausen*, 977 F.2d 464, 467 (9th Cir. 1992) (potential government interest "too ethereal to fall within the protections of a statute that 'had its origin in the desire to protect individual property rights'" (quoting *McNally v. United States*, 483 U.S. 350, 359 n.8 (1987)); *United States v. Holzer*, 840 F.2d 1343, 1348 (7th Cir.) (Posner, J.) (concluding that the money-or-property requirement was not satisfied where the object of the charged scheme was property of the alleged victim "only in an attenuated and artificial sense," *i.e.*, under a constructive-trust theory), *cert. denied*, 486 U.S. 1035 (1988); *cf. United States v. Miller*, 997 F.2d 1010, 1020 (2d Cir. 1993) (following *Holzer* and holding that a constructive-trust theory was insufficient to satisfy the money-or-property requirement); *United States v. Walgren*, 885 F.2d 1417, 1424 (9th Cir. 1989) (same); *Goodrich*, 871 F.2d at 1014-15 (same); *United States v. Shelton*, 848 F.2d 1485, 1492 (10th Cir. 1988) (en banc) (same); *United States v. Ochs*, 842 F.2d 515, 525-27 (1st Cir. 1988) (rejecting constructive-trust theory).

subsidies to business — is originally public property.[33] Third, the article cites no case that says so.

Finally, licenses are fundamentally different from other forms of "largess" addressed by Professor Reich. Of course money paid by the government to Social Security recipients and others was originally public property, but the same is not true of licenses. "[T]he fact that an individual's property 'originated in' or 'came from' the government in no way compels the conclusion that it was originally government *property*." Comment, *License Procurement and the Federal Mail Fraud Statute*, 58 U. CHI. L. REV. 1125, 1146 (1991) (emphasis in original).

4. The *Salvatore* court insisted that Louisiana has "a property interest in its licenses" because the operations of video poker license holders provide "significant revenues" to the State. 110 F.3d at 1141-42. In addition to an annual fee, the State receives 22.5% of each licensee's net device

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[33] The article advances various observations and theories about eight forms of "largess": benefits such as Social Security and welfare, income from government jobs, occupational licenses, franchises, contracts, subsidies, use of public resources, and services. *See* 73 YALE L.J. at 734-37. The sentence seized on by the Third and Fifth Circuits states that "The chief obstacle to the creation of private rights in largess has been the fact that it is originally public property, comes from the state, and may be withheld completely." *Id.* at 778. This sentence merely purports to summarize an objection raised by others to recognizing private rights in government "largess." It is hardly an assertion that occupational licenses in particular—only one of the eight forms of largess discussed in the article—are property of the government before issuance. The reference to "[t]he chief obstacle" to recognition of private rights would naturally denote the most frequently heard objection, not necessarily an objection applicable to *every* form of largess. The objection is one that applies, not to occupational licenses, but to other forms of "largess," including the first two forms that the article discusses, *i.e.*, benefits such as Social Security and welfare, and income from government jobs, which in combination exceeded $100 billion each year. *See id.* at 734, 737.

revenue. *Id.* at 1142. But the fact that the State *receives* money from the licensee in no way suggests that the State is *deprived* of property when it issues the license. Just as the defendant's conduct in *Toulabi* "did not deprive Chicago of property; it fattened the City's treasury by $50 (the license fee) for each extra license issued," 875 F.2d at 125, in Louisiana the State's treasury is "fattened" both when it receives the annual fees and when it receives a share of net device revenue. The State is actually receiving money, not being deprived of property.

D. The Majority View in the Circuit Courts Is Supported by the Rule of Lenity.

Even if this Court considered the mail fraud statute ambiguous as applied to alleged schemes to obtain government licenses, reversal would be required under the principle that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Jones v. United States*, 68 U.S.L.W. 4422, 4425 (U.S. May 22, 2000) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).[34] This interpretive guide serves "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

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[34] *See United States v. Granderson*, 511 U.S. 39, 54, 56 (1994); *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994); *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Crandon v. United States*, 494 U.S. 152, 158 (1990); *McNally v. United States*, 483 U.S. 350, 359-60 (1987) (interpreting the mail fraud statute); *Tanner v. United States*, 483 U.S. 107, 131 (1987); *Liparota v. United States*, 471 U.S. 419, 427 (1985); *Dowling v. United States*, 473 U.S. 207, 213-14, 229 (1985); *Williams v. United States*, 458 U.S. 279 (1982); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952); *Fasulo v. United States*, 272 U.S. 620, 629 (1926) (interpreting the mail fraud statute).

The third of these purposes bears emphasis here. As the Court cautioned in *United States v. Bass*, 404 U.S. 336 (1971),

> [B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."

Id. at 348 (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 196, 209 (1967)). There has been no legislative determination that the mail fraud statute should extend beyond schemes to deprive someone of money or property, and reach schemes that seek only issuance of a government license.

Congress is the proper forum for the Government to press its view that schemes involving license applications should be punishable as mail fraud. *Cf. United States v. Maze*, 414 U.S. 395, 405 n.10 (1974) ("If the Federal Government is to engage in combat against fraudulent schemes not covered by the [mail fraud] statute, it must do so at the initiative of Congress and not of this Court."). Congress of course could agree with the Government, but Congress also could well decide that it would be unjust to treat such schemes as mail fraud. The offense of mail fraud is not only punishable by up to five years' imprisonment, but is also a predicate offense under RICO, *see* 18 U.S.C. § 1961(1), and thus under the money laundering statute as well. *See* 18 U.S.C. § 1956(c)(7)(A). Those statutes authorize sentences of up to 20 years' imprisonment. *See* 18 U.S.C. §§ 1956(a), 1963(a). Long prison terms are common under the RICO and money laundering statutes (and often required absent a downward departure), as this case illustrates. Although petitioner did not sign any of the license applications or even see them

before they were submitted, he was sentenced to ten years and one month in prison. "[T]he wisdom of leaving it to the legislature to define crime and prescribe penalties," *Dowling v. United States*, 473 U.S. 207, 228 (1985), is further reason to reject the Court of Appeals' expansive interpretation.

In *Salvatore* the Fifth Circuit made no mention of lenity and instead "beg[a]n with the proposition that the concept of property rights should be given a broad interpretation for the purposes of the mail fraud statute." 110 F.3d at 1139. Ultimately, however, that proposition stems from a misreading of *McNally*. The *Salvatore* court relied upon the Fifth Circuit's prior statement in *United States v. Loney*, 959 F.2d 1332 (5th Cir. 1992), that "we construe 'property' in a broad sense for purposes of the federal fraud statutes." *Id.* at 1336. But the sole authority the *Loney* court cited in support of that statement was the following passage from *McNally*:

> *Durland v. United States*, 161 U.S. 306 (1896), the first case in which this Court construed the meaning of the phrase "any scheme or artifice to defraud," held that the phrase "any scheme or artifice to defraud" is to be interpreted broadly insofar as property rights are concerned.

McNally, 483 U.S. at 356. As the Second Circuit has explained in rejecting the Government's argument that this passage supports a broad interpretation of property rights, "This quotation means that once a property right is found, any attempt to take the right by trickery is punishable, but it implies nothing about when to find a property right." *Evans*, 844 F.2d at 40. That the Second Circuit is correct is apparent from *Durland*, which the *McNally* Court described in the disputed passage. Nothing in *Durland* suggests that the mail fraud statute embodies a broad concept of property.[35]

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[35] In *Martinez* the Third Circuit also relied upon the notion that the mail fraud statute should be accorded a broad interpretation, citing

II. CONGRESS'S ACTION AFTER *MCNALLY* DEMONSTRATES THAT IT DID NOT INTEND THE MAIL FRAUD STATUTE TO COVER DECEPTIONS IN STATE LICENSE APPLICATIONS.

An additional ground for reversal is Congress's decision in 1988 to restore only one "intangible right," not involving money or property, that had been recognized in the lower courts before *McNally*. The sole change Congress made in 1988 was to bring within the mail fraud statute (and certain other fraud statutes) "a scheme or artifice to deprive another of the intangible right of honest services."[36] The Court of Appeals' decision here is contrary to Congress's intent, because that decision effectively recognizes another intangible right, the right to run a licensing program based on full and complete information. Congress did not restore that right even though it knew that indictments for alleged licensing fraud, which had been based on such an intangible right, had been dismissed in reliance upon *McNally*.

Prior to *McNally*, numerous lower court decisions had approved application of the mail fraud statute to schemes involving deprivation of "intangible rights," whether or not anyone's money or property was implicated. One line of cases allowed mail fraud charges to be based on schemes calculated to deprive the victim of the right to the honest services of an agent or employee. *See, e.g., United States v.*

Congress's action in 1988 in providing that a "scheme to defraud" includes a scheme to deprive another of the intangible right of honest services. *Martinez*, 905 F.2d at 715. As demonstrated in Part II, *infra*, Congress's response to *McNally* in fact indicates that it did not intend to authorize use of the mail fraud statute as a vehicle for punishing alleged deception in license applications.

[36] Anti-Drug Abuse Act of 1988, Pub. L. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508 (Nov. 18, 1988) (codified at 18 U.S.C. § 1346).

Von Barta, 635 F.2d 999, 1006-07 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981); *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980). Other cases approved charges predicated on other "intangible rights," including "the right to conscientious, loyal, faithful, disinterested and honest government;"[37] a client's right to the "undivided loyalty" of his attorney;[38] and an electoral body's "political rights to fair elections free from dilution from the intentional casting and tabulation of false, fictitious or spurious ballots."[39] In combination such decisions resulted in "'an extraordinary expansion of the mail and wire fraud statutes to permit federal prosecution for conduct that some had thought was subject only to state criminal and civil law.'" *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 502 (1985) (Marshall, J., joined by Brennan, Blackmun & Powell, JJ., dissenting) (quoting *United States v. Weiss*, 752 F.2d 777, 791 (2d Cir.) (Newman, J., dissenting in part), *cert. denied*, 474 U.S. 944 (1985)).

This expansion led some prosecutors to bring mail fraud charges based on alleged deception in state license applications, and to describe an "intangible right" of which the state agency was purportedly defrauded. For example, in *United States v. Green*, 577 F. Supp. 935 (N.D. Cal. 1984), a mail fraud charge was in part based on allegations of a scheme "'to defraud the California Department of Motor Vehicles of its right to have its California Driver's License

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[37] *United States v. Mandel*, 591 F.2d 1347, 1359 (4th Cir.), *aff'd en banc in relevant part*, 602 F.2d 653 (1979), *cert. denied*, 445 U.S. 961 (1980). *See United States v. Isaacs*, 493 F.2d 1124, 1150 (7th Cir.) ("The citizens of Illinois were defrauded of Kerner's honest and faithful services as governor."), *cert. denied*, 417 U.S. 976 (1974).

[38] *United States v. Bronston*, 658 F.2d 920, 927 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

[39] *United States v. Clapps*, 732 F.2d 1148, 1152 (3d Cir.), *cert. denied*, 469 U.S. 1085 (1984).

program administered free from falsehood and deceit.'" *Id.* at 936 (quoting indictment). The court held that the indictment alleged "a sufficient 'intangible right'" to state an offense. *Id.* at 937. Similarly, in *United States v. Murphy*, 836 F.2d 248 (6th Cir.), *cert. denied*, 488 U.S. 924 (1988), the defendant was convicted under an indictment alleging a scheme "'to defraud the State of Tennessee of the right to issue certificates of registration to charitable organizations to conduct bingo games, based on complete, true and accurate information to be provided by those applying for said permits.'" 836 F.2d at 251 (quoting indictment). The Government also prosecuted former Tennessee Governor Ray Blanton for mail fraud, in part based on allegations of a scheme to defraud "the State, its citizens, officers, employees and applicants for retail liquor licenses of their right to have the business of the Alcoholic Beverage Commission conducted honestly" and in accordance with certain statutes, rules, and regulations. *See United States v. Blanton*, No. 3-86-0593, 1988 WL 182378, at *2 (M.D. Tenn. Jan. 27, 1988).

The defendants in both *Murphy* and *Blanton* were convicted of mail fraud, but shortly after *McNally* their convictions were vacated and the indictments were dismissed. *See Murphy*, 836 F.2d at 257; *Blanton*, 1988 WL 182378, at *6. In each case the court held that the charges had depended upon an intangible right, and that the licensing authorities had not parted with property in issuing the licenses. *Murphy*, 836 F.2d at 253-54; *Blanton*, 1988 WL 192378, at *4-5. Both cases were decided in January 1988.

Although it would be appropriate to presume that Congress was aware of these developments,[40] the legislative history confirms that Congress knew of the adverse effect of *McNally* on mail fraud prosecutions for alleged deception in obtaining

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[40] *See, e.g., Johnson v. Home State Bank*, 501 U.S. 78, 86 (1991); *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979).

licenses. For example, on the day the House of Representatives approved what is now 18 U.S.C. § 1346, the fact that indictments alleging licensing fraud had been dismissed as a result of *McNally* was specifically discussed on the House floor. *See* 134 Cong. Rec. 33296 (1988) (statement of Rep. Conyers):

> The Subcommittee on Criminal Justice, which I chair, held a hearing on the McNally decision on May 12, 1988. At that hearing John C. Keeney, Acting Assistant Attorney General for the Criminal Division, U.S. Department of Justice, testified that as a result of the McNally decision many significant prosecutions of political corruption brought under the mail and wire fraud statutes have been dismissed or overturned on appeal. Mr. Keeney pointed out that cases involving bribery, money laundering, election fraud, and *licensing fraud* have been dismissed because there was no monetary loss to any victim.

(Emphasis added).[41]

In these circumstances, it is significant that Congress did *not* provide that a scheme to defraud may consist of scheme to deprive a governmental entity of an "intangible right" such as the right to administer a licensing program based on full and complete information. Bills were introduced that would have recognized a wide range of "intangible rights" and

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[41] *See also* 134 Cong. Rec. 15045 (1988) (statement of Sen. McConnell) (citing the Sixth Circuit's decision in *Murphy*, with the description "indictment charging state official with scheme to cause State to issue a bingo license based on untrue information dismissed under McNally"); *Mail Fraud: Hearing on H.R. 3089 Before the Subcomm. on Criminal Justice of the House Judiciary Comm.*, 100th Cong. 8 (May 12, 1988) ("*Hearing*") (testimony of Acting Assistant Attorney General Keeney explaining that as a result of *McNally*, cases involving "licensing fraud" had been dismissed); *id.* at 14-15 & n.5 (prepared statement of Mr. Keeney noting that cases involving licensing fraud had been dismissed because of *McNally*, and citing the Sixth Circuit's decision in *Murphy*).

plainly would have authorized prosecution of alleged deception in licensing applications, but Congress opted instead to enact much narrower legislation.

Some in Congress favored broad legislation that would have authorized mail fraud prosecutions based on a broad spectrum of "intangible rights." The broadest set of bills, introduced by Representative Conyers and Senator Specter, would have provided, *inter alia*, that in Title 18 "The term 'fraud' or 'defraud' includes defrauding another – (1) of intangible rights *of any kind whatsoever in any manner for any purpose whatsoever.*"[42] Another bill, introduced by Representative Mfume, would have listed numerous "intangible rights" that could support prosecution. It would have provided that, for purposes of the mail, wire, and bank fraud statutes,

> the term "defraud" includes the defrauding of the citizens of a body politic—
>
> (1) of their right to the conscientious, loyal, faithful, disinterested, and unbiased performance of official duties by a public official thereof; or
>
> (2) or their right to have the public business conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, *deceit*, official misconduct, and fraud.[43]

Either the Specter/Conyers proposal or the Mfume proposal would have covered the intangible right at issue in this case, "Louisiana's right to choose the persons to whom it issues video poker licenses." *Salvatore*, 110 F.3d at 1140.

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[42] H.R. 3089, 100th Cong. § 2 (1987), introduced 133 Cong. Rec. 22313 (1987) (emphasis added); S. 1898, 100th Cong. § 2, introduced 133 Cong. Rec. 33253 (1987) (emphasis added).

[43] H.R. 3050, 100th Cong. § 2 (Rep. Mfume), introduced 133 Cong. Rec. 21469 (1987) (emphasis added).

There was opposition, however, to such broad legislation—both from members of Congress and from the Administration. For example, Senator McConnell was convinced that *McNally* was "on solid legal ground," though he recognized the need for new legislation to address government corruption.[44] The Department of Justice also concluded that the appropriate response to *McNally* was enactment of a new public corruption offense.[45] Along with Senator Thurmond, Senator McConnell introduced, as an alternative to bills changing the definition of "defraud," a bill that would have created a new federal offense, public corruption.[46] "This legislation," Senator McConnell explained, "was prepared and approved by the Justice Department . . ."[47] The legislation would have made it a felony punishable by up to ten years in prison to engage in "any scheme or artifice corruptly to defraud or deprive the inhabitants of a State or political subdivision of a State of *the honest services* of an official or employee."[48] Representative Michel and 105 co-sponsors introduced a similar bill in the House.[49]

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[44] 134 Cong. Rec. 15045 (1988) (reprinting newspaper editorial by Senator McConnell, which he asked to include in the Congressional Record).

[45] *See Hearing*, at 8-37 (testimony and prepared statement of Acting Assistant Attorney General Keeney).

[46] Anti-Public Corruption Act of 1988, S. 2531, 100th Cong. (1988), introduced 134 Cong. Rec. 15123 (1988).

[47] 134 Cong. Rec. 15041 (1988).

[48] S. 2531, sec. 2(a), § 225(a) (emphasis added).

[49] Comprehensive Anti-Drugs Act of 1988, H.R. 4842, Subtitle J, sec. 2102(a), § 225(a), 100th Cong. 134, introduced Cong. Rec. 14854 (1988). *See also* H.R. 4871, 100th Cong. (1988), introduced 134 Cong. Rec. 15469 (1988) (Rep. Gekas) (utilizing same format as McConnell-Thurmond bill rather than including proposed provision in anti-drug bill).

Ultimately, Congress decided not to create a new offense of public corruption. It did embrace, however, the concept at the heart of the approach advocated by Senators McConnell and Thurmond, Representative Michel and 105 others in the House, and the Department of Justice—namely, that what was in need of protection was the right of honest services. Congress chose to safeguard that right by specifying that, for purposes of the mail, wire, and bank fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible rights of honest services." [50] Congress did not restore any other intangible right. Neither the bills covering all intangible rights that had been introduced by Senator Specter and Representative Conyers, nor Representative Mfume's bill covering (among other things) the intangible right to have the public business conducted free from deceit, was ever passed.

In short, Congress knew that indictments based on applications for licenses had been dismissed in reliance upon *McNally*, bills were introduced that would have restored intangible rights that could have been used to prosecute alleged deception in license applications, and Congress chose to pass instead a bill restoring only the intangible right of honest services. The only reasonable inference is that Congress did not intend the mail fraud statute to be a vehicle for prosecuting alleged false statements or omissions in license applications, nor did it intend to restore any intangible right other than the intangible right of honest services. In *McNally* this Court had plainly said: "If Congress desires to go further, it must speak more clearly than it has." 483 U.S. at 360. Congress did decide to go further, but only as to one intangible right.

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[50] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508 (1988) (codified at 18 U.S.C. § 1346).

This is an additional reason to reverse the decision below. By affirming convictions based on alleged false statements and omissions in applications for video poker licenses, that decision in effect reads into the mail fraud statute an intangible right to administer a licensing program based on full and complete information. That is an intangible right Congress did not restore.[51]

CONCLUSION

Petitioner was charged with participating in a scheme to deprive "the State of Louisiana and its citizens" of "property" by "fraudulently obtaining and renewing, through the submission of false and incomplete information, state licenses to operate video poker sites." R. 441. Because the mail fraud statute, properly construed, does not cover a scheme or artifice to obtain a video poker license, petitioner's mail fraud convictions cannot stand.

The invalidity of the mail fraud counts requires that petitioner's money laundering, RICO, and RICO conspiracy convictions also be reversed. In granting petitioner's application for release pending the decision of this Court, the District Court recognized that "A Supreme Court decision in Cleveland's favor would lead to reversal of his mail fraud convictions, as well as his money laundering, RICO, and RICO conspiracy convictions." Order and Reasons, April 27, 2000, at 4. The money laundering convictions must be reversed because petitioner was acquitted of illegal gambling, the only alleged "specified unlawful activity" besides mail

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[51] The language employed by the Government in the indictment here is reminiscent of the expressions common in the pre-*McNally* era when numerous intangible rights were recognized, including ones relating to licensing programs. *See* R. 441 (alleging a scheme "to defraud the State of Louisiana *and its citizens*" (emphasis added)); *see also Martinez*, 905 F.2d at 714 (referring in part to what the "people" of Pennsylvania purportedly lost as a result of a false license application).

fraud alleged in the money laundering charges. R. 444. Petitioner's RICO conviction must be reversed because, without the alleged predicate acts of mail fraud and money laundering, the two predicate acts required for a RICO conviction would be lacking. R. 422-27. *See, e.g., United States v. Sanders*, 929 F.2d 1466, 1473 (10th Cir.), *cert. denied,* 502 U.S. 846 (1991). And his RICO conspiracy conviction must be reversed because it surely was based on a finding of a conspiracy to commit a purported RICO offense involving one or both of those alleged predicate acts, R. 422-24, 428. *See Salinas v. United States*, 522 U.S. 52, 65 (1997) (RICO conspiracy charges are governed by the principle that "A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense . . . .").

The District Court's error in denying the motion to dismiss the mail fraud counts and alleged predicate acts of mail fraud also requires reversal as to the tax counts.[52] As a result of the error, when the jury considered the tax counts (Counts 13 and 15), it already had found petitioner guilty on eight different counts (Counts 1, 2, 5, 6, 8, 9, 10, and 12) charging four different felonies (racketeering, racketeering conspiracy, mail fraud, and money laundering). R. 90–91. Every one of those other convictions depended on the invalid premise that Louisiana was deprived of property when it issued video poker licenses. Particularly because the Government married its case on the tax counts to its case on the other counts, T. 4683 (government argues in summation that "It's really not a tax case so much. It's a truth case. . . . The same lies we have seen over and over again pop up here."), it is impossible to say with confidence that the verdict on the tax counts

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[52] The District Court came to a contrary conclusion in its order granting release. *See* Order and Reasons, April 27, 2000, at 5.

would have been the same if the jury had considered those counts on a clean slate.

For the reasons stated, the judgment of the Court of Appeals should be reversed.

Respectfully Submitted,

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ADDENDUM A

Title 18 United States Code

Section 1341 provides:

Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

ADDENDUM B

The Louisiana Video Draw Poker Devices Statute, La. Rev. Stat. Ann. §§ 33:4862.1–4862.23 (West Supp. 1996), provided in pertinent part:

PART V-B Video Draw Poker Devices

§ 4862.1. Short title and definitions

. . . .

D. Any license applied for, granted, or issued under the provisions of this Part is a pure and absolute privilege, the awarding, denial, or withdrawal of which is solely within the discretion of the division and, except as provided in this Part, without recourse at law. Any license issued or renewed under the provisions of this Part is not property or a protected interest under the constitutions of either the United States or the state of Louisiana.

[§§ 4862.2–.5 omitted]

§ 4862.6. State license qualifications; limitations; right to hearing

A. (1) The legislature hereby recognizes the importance of a controlled gaming industry to the development of the economy of the state of Louisiana. The legislature further recognizes that the success and growth of gaming are dependent upon public confidence and trust that gaming activities and particularly video draw poker gaming activities are conducted honestly and are free from criminal and corruptive elements. The state of Louisiana has a legitimate interest in providing strict regulation of all persons, practices, associations, and activities related to the operation of licensed establishments licensed to offer video draw poker devices, and the manufacture, supply, or distribution of video draw poker gaming devices and supplies, in order to maintain public confidence and trust in the video draw poker gaming

industry. The legislature hereby finds that the types of establishments which may place video draw poker devices at their licensed establishments each possess unique features, some of which are volume of business, number of establishments, and hours required of the division to insure suitability prior to licensing. Therefore, in order to provide the most effective regulation and control of the video draw poker gaming industry, it is necessary to develop three categories of licenses which may be issued to qualified establishments for the privilege of operating video draw poker devices.

. . . .

(4)(a) A person owning a qualified truck stop facility may be granted a license for the placement of not more than fifty video draw poker devices in his facility based on the fuel sales as provided in Subparagraph (b) of this Paragraph, in an area separated for adult patronage only, if all other requirements of this Part are met. There shall be only one license granted for the operation of video draw poker devices at each qualified truck stop facility.

. . . .

[§ 4862.7 omitted]

§ 4862.8. Powers and duties of division; restrictions; permits

A. The division shall promulgate rules and regulations necessary to facilitate implementation of this Part and specifically to:

(1) Provide permit, application, and licensing procedures.

(2) Prescribe necessary application and reporting forms.

(3) Establish qualifications and duties of certified technicians.

(4) Provide for the protection of legitimate economic interests of licensees, creditors, and other parties involved in the operation, financing, manufacture, distribution, sale, and servicing of video draw poker devices and equipment.

B. The division may deny, condition, suspend, or revoke any license applied for or issued pursuant to the provisions of this Part for any violation of the provision of this Part or any rule or regulation of the division. In lieu of suspending or revoking a license issued pursuant to the provisions of this Part, the division may levy a fine not to exceed one thousand dollars per violation against any licensee. The division shall not levy a fine, condition the license of, or reinstate the license of any person or the approval of any device unless and until the person or device meets all criteria and requirements to be licensed or approved for play.

C. The division shall revoke or suspend the license of any person or approval of any device issued pursuant to the provisions of this Part if the division finds that the person licensed or device approved did not meet, at the time of application, or does not continue to meet the suitability or any other requirements specified in this Part.

D. For a period of five years from the date of the revocation of the license, no license authorized by this Part may be granted to any person whose previous license was revoked by the division.

E. The division and its agents may:

(1) Inspect and examine all premises where video draw poker devices are offered for play or where video draw poker devices or equipment are manufactured, sold, or distributed.

(2) Inspect all video draw poker devices and related equipment and supplies in, upon, or about such premises.

(3) Summarily seize and remove from such premises and impound any video draw [*sic*] devices, equipment, or supplies for the purpose of examination and inspection.

(4) Promulgate rules and regulations requiring licensees or former licensees to maintain specified records, including financial and income records, of video draw poker devices and operations.

(5) Promulgate rules and regulations to provide for minimum physical security standards at licensed establishments to maintain safety and integrity within the gaming area.

F. The division shall have the authority to issue subpoenas and to compel the attendance of witnesses before it, to administer oaths at its official proceedings, to require testimony under oath, and to punish as contempt the failure to obey its orders. Appeal of an action by the division holding a person in contempt shall be to the Nineteenth Judicial District Court.

G. The division, within ten days after granting a license for the placement of video draw poker devices in a licensed establishment, shall notify the local governing authority of the municipality or, if not in a municipality, of the parish where the licensed establishment is located of the approval and granting of the license.

§ 4862.9. Video draw poker crimes and penalties; unauthorized devices

A. Any person who intentionally makes, causes to be made, or aids, assists, or procures another to make a false statement in any report disclosure, application, permit form, or any other document required by this Part may, upon conviction, be imprisoned, with or without hard labor, for not more than ten years or be fined not more than ten thousand dollars, or both.

B. Any person who possesses or operates a gambling device as described in R.S. 15:31, or a video draw poker device as described in this Part without the license required by this Part or at a location or on premises not authorized by the division shall, upon conviction, be imprisoned with or without hard labor for not more than ten years or be fined not more than ten thousand dollars, or both.

C. Skimming of video draw poker proceeds is the intentional excluding, or the taking of any action in an attempt to exclude, anything or its value from the deposit, counting, collection, or computation of revenues from video draw poker. Whoever commits skimming of video draw poker proceeds shall be imprisoned at hard labor for not less than one year nor more than ten years, without benefit of probation, parole, or suspension of sentence, and may be fined not more than twenty-five thousand dollars.

D. Any video draw poker device used or offered for play in violation of the provisions of this Part shall be considered a gambling device for purposes of R.S. 15:31.

§ 4862.10. Suitability requirements

A. No person may be eligible to apply or be granted a license under the provisions of this Part if he has been convicted in any jurisdiction of any of the following offenses within ten years prior to the date of the application or less than ten years has elapsed between the date of application and the successful completion or service of any sentence, deferred adjudication, or period of probation or parole for any of the following:

(1) Any offense punishable by imprisonment for more than one year.

(2) Theft or any crime involving false statements or declarations.

(3) Gambling as defined by the laws or ordinances of any municipality, any parish, any state, or the United States.

B. (1) No person shall be granted a license under the provisions of this Part unless the applicant has demonstrated to the division that he is suitable for licensing. For purposes of this Part, suitability means the applicant or licensee is:

(a) A person of good character, honesty, and integrity.

(b) A person whose prior activities, arrest or criminal record if any, reputation, habits, and associations do not pose a threat to the public interest of this state or to the effective regulation of video draw poker, and do not create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and operations in the activities authorized by this Part and financial arrangements incidental thereto.

(c) Likely to conduct business as authorized by this Part in complete compliance with the provisions of this Part.

(d) Not prohibited from making application or disqualified from licensure under the provisions of Subsection A of this Section.

(e) A person who does not owe the state or local governing authority of the parish or municipality in which the establishment is located any delinquent sales taxes, penalties, or interest, excluding items under formal appeal or protest as provided by law.

(2) An applicant who is not disqualified from making application or licensure as a result of Subsection A of this Section shall still be required to demonstrate to the division that he otherwise meets the remaining requirements for suitability, particularly those contained in Subparagraphs (1)(a), (b), and (c) of this Subsection. Evidence of or relating to an arrest, summons, charge, or indictment of an applicant, or the dismissal thereof, shall be considered by the division

even if the arrest, summons, charge, or indictment results in acquittal, deferred adjudication, probation, parole, or pardon.

C. All licensees and persons required to be qualified under this Chapter shall have a continuing duty to inform the division of any action which they believe would constitute a violation of this Chapter. No person who so informs the division shall be discriminated against by an applicant or licensee because of supplying such information.

D. Every person who has or controls directly or indirectly more than a five percent ownership, income, or profit interest in an entity which has or applies for a license in accordance with the provisions of this Part, or who receives more than five percent revenue interest in the form of a commission, finder's fee, loan repayment, or any other business expense related to the gaming operation, or who has the ability, in the opinion of the division, to exercise a significant influence over the activities of a licensee authorized or to be authorized by this Part, shall meet all suitability requirements and qualifications for licensees. For the purposes of this Part, all gaming related associations, outstanding loans, promissory notes, or other financial indebtedness of an applicant or licensee must be revealed to the division for the purposes of determining significant influence and suitability.

E. A person whose application for a license has been denied, or whose license has been issued subject to a condition or suspended or revoked, or against whom a fine has been levied has the right to a hearing before the division. The hearing must be conducted in accordance with the provisions of the Administrative Procedure Act. All parties, including the division, shall have the right to appeal any adverse ruling to the Nineteenth Judicial District Court. The division shall be provided with legal counsel and representation through the office of general counsel of the Department of Public Safety and Corrections. The division may seek additional legal assistance upon the

recommendation and advice of its legal counsel. The office of general counsel of the Department of Public Safety and Corrections may issue advisory opinions relative to the statutes that are enacted and rules that are adopted by the division. Such advisory opinions may be issued within ten days of the receipt of a written request for opinion. In no event shall an advisory opinion have the effect of law.

§ 4862.11. Licensing by division; fees; franchise payments; enforcement activities

A. The division shall annually issue the following kinds of licenses to qualified persons who meet the definition provided for in R.S. 33:4862.1 and the state license qualifications set forth in R.S. 33:4862.6 and who comply with the provisions of this Part:

(1)	Manufacturer	$20,000
(2)	Distributor	$10,000
(3)	Service Entity	$2,000
(4)	Device Owner	$2,000
(5)	Device Operation:	
	(a) A restaurant, bar, tavern, cocktail lounge, club, motel, or hotel	$250
	(b) (i) A Louisiana State Racing Commission licensed pari-mutuel wagering facility	$1,250
	(ii) A Louisiana State Racing Commission licensed offtrack wagering facility	$1,000
	(c) A qualified truck stop facility	$1,000
(6)	Licensed Establishment	$100

B. A device owner shall pay a device owner fee for the privilege of owning and operating video draw poker devices and shall not be required to pay more than one device owner fee. A separate device operation fee, payable by the device owner, shall be levied for each video draw poker device placed by the device owner at a licensed establishment. The device operation fee may be paid in quarterly installments.

C. The device owner fee shall be due and payable in addition to any licensed establishment fee resulting from the placement of a video draw poker device at that establishment. If more than one video draw poker device is placed at a licensed establishment, only one licensed establishment fee is due for that establishment.

D. (1) Each device owner shall remit to the division a franchise payment, in an amount equal to a percentage of the net device revenue derived from the operation of each video draw poker device owned by him. The amount of the percentage shall be based on the type of licensed establishment authorized by the division for the placement of video draw poker devices, as follows:

(a) A restaurant, bar, tavern, cocktail lounge, club, motel, or hotel . . . . . 26%.

(b) A qualified truck stop facility . . . . . 32.5%.

(2) Notwithstanding the provisions of Paragraph (1) of this Subsection, when the distribution of net device revenues is governed by R.S. 33:4862.18, the franchise payment shall be twenty-two and one-half percent of the net device revenues.

(3) Revenues received from franchise payments shall be deposited in the state treasury and may be used for enforcement activities, subject to legislative appropriation, in accordance with the provisions of R.S. 33:4862.12.

(4) Of the amount attributable to the payment of franchise fees as required in this Section, an amount equal to the avails of one-half of one percent of the franchise fee rate shall be allocated as provided in R.S. 33:4862.12 and appropriated by the legislature as provided in R.S. 33:4862.23.

E. No license shall be issued by the division except upon receipt of a sworn application and a finding by the division that the applicant, the application, and all persons described in R.S. 33:4862.10 meet the requirements of that Section.

F. No person who is licensed as or has a direct or indirect financial interest in an entity licensed as a manufacturer of video draw poker devices shall be licensed as a distributor or device owner or have his premises licensed for operation of video draw poker devices, pursuant to the provisions of this Part.

G. Any license issued pursuant to the provisions of this Part shall be personal to the licensee to whom it was issued and shall not be transferable.

H. A processing fee for applications shall be charged by the division as follows:

(1) New applications for establishments having three devices, one thousand dollars.

(2) New applications for truck stop facilities, ten thousand dollars.

(3) Renewal applications for facilities, having three devices and pari-mutuel wagering facilities, one hundred dollars.

(4) Renewal applications for truck stop facilities, one thousand dollars.

[§§ 4862.12—.23 omitted]

(8)

No. 99-804

In the Supreme Court of the United States

CARL W. CLEVELAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the federal mail fraud statute, 18 U.S.C. 1341, reaches a scheme to obtain a video poker license from the State of Louisiana by means of false representations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 182 F.3d 296. The opinion of the district court (Pet. App. 52a-86a) is reported at 951 F. Supp. 1249.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1999. The petition for rehearing was denied on September 2, 1999 (Pet. App. 45a-47a). The petition for a writ of certiorari was filed on November 9, 1999, and was granted on March 20, 2000, limited to the first

question presented. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 1341 of Title 18 of the United States Code is set forth in Appendix A to this brief.

STATEMENT

This case arises out of a scheme to obtain a lucrative video poker license from the State of Louisiana by submitting false information to the State about the prospective licensee's true owners. Petitioner challenges the court of appeals' holding that such a scheme violates the federal mail fraud statute, 18 U.S.C. 1341.

1. In 1992, Fred Goodson and his family formed Truck Stop Gaming, Ltd. (TSG, Ltd.) and its corporate partner, Truck Stop Gaming, Inc. (TSG, Inc.), in order to participate in the video poker business at their truck stop in Slidell, Louisiana. Petitioner Carl Cleveland, a lawyer, assisted the Goodsons in preparing applications for a video poker license for TSG, Ltd., and submitting those applications to the State. The applications required a partnership seeking a gaming license to identify its partners, to submit personal financial statements for all partners, to affirm that the listed partners were the sole beneficial owners of the business, and to affirm that no partner had an arrangement to hold his interest as "an agent, nominee or otherwise," or a present intention to transfer any interest in the partnership at a future time. Pet. App. 2a-3a.

The initial application submitted on behalf of TSG, Ltd., identified Maria and Alex Goodson, Fred Goodson's adult children, as the limited partners and TSG, Inc., as the general partner. The application listed no other persons or entities as having any ownership interest in TSG, Ltd. In 1993, 1994, and 1995, TSG,

Ltd., submitted renewal applications that likewise listed no additional ownership interests. In fact, the true owners of TSG, Ltd., at all times were petitioner and Fred Goodson, both of whom concealed their ownership interests from state regulators to avoid an inquiry into their suitability as owners of a licensee. Pet. App. 5a-6a; see La. Rev. Stat. Ann. § 27:310(B) (West 1989 & Supp. 2000) (enumerating suitability requirements for video poker licensees).[1]

2. In 1996, a federal grand jury in the Eastern District of Louisiana indicted petitioner, Fred and Maria Goodson, and others on multiple counts of mail fraud, racketeering, and various other offenses. The indictment alleged, among other things, that the defendants committed mail fraud, in violation of 18 U.S.C. 1341, by obtaining a video poker license for TSG, Ltd., in 1992 and renewing the license in 1993, 1994, and 1995, by fraudulently concealing that petitioner and Fred Goodson were the true owners of TSG, Ltd. Pet. App. 5a.

Before trial, petitioner moved to dismiss the mail fraud counts of the indictment on the ground that state licenses to operate video poker machines do not constitute "property" within the meaning of Section 1341, which makes it a crime to use the mails in connection with "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. Petitioner claimed that a scheme to acquire a video poker license through false representations does not implicate any property interest of the

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[1] The evidence at trial indicated that petitioner and Fred Goodson had tax and financial problems that could have interfered with or delayed approval of the license if their interests in TSG, Ltd., had been disclosed. See Gov't C.A. Br. 11.

State, arguing that such licenses have no value to the State and, consequently, do not become property until they are issued by the State to a private party.

The district court rejected that contention. Pet. App. 73a-86a. The court concluded that "licenses constitute property even before they are issued," agreeing with the position of the First Circuit and the Third Circuit on that question. *Id.* at 79a; see also *id.* at 75a-77a (citing *United States* v. *Bucuvalas*, 970 F.2d 937 (1st Cir. 1992), cert. denied, 507 U.S. 959 (1993), and *United States* v. *Martinez*, 905 F.2d 709 (3d Cir.), cert. denied, 498 U.S. 1017 (1990)). The court distinguished cases involving other sorts of licenses, such as taxi licenses, pilot's licenses, and arms export licenses, in which a government was held to have only a regulatory interest, and not a property interest. *Id.* at 83a. The court reasoned that the State of Louisiana clearly has a property interest in video poker licenses because the State "receives a significant percentage of revenue" from the licenses and "continues to exercise a great deal of control" over them. *Id.* at 83a.

After a jury trial, petitioner was convicted on two counts of mail fraud. He was also convicted of conducting an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); money laundering, in violation of 18 U.S.C. 1956 (1994 & Supp. II 1996); tax conspiracy, in violation of 18 U.S.C. 371; and filing a false tax return, in violation of 26 U.S.C. 7206(2). He was sentenced to 121 months' imprisonment.

3. The Fifth Circuit affirmed petitioners' conviction and sentences. Pet. App. 1a-44a.

The court of appeals rejected petitioner's contention that a video poker license does not constitute property

for purposes of the mail fraud statute. Pet. App. 19a. The court relied on its earlier decision in *United States* v. *Salvatore*, 110 F.3d 1131 (5th Cir.), cert. denied, 522 U.S. 981 (1997), which held that Louisiana had a property interest in the video poker licenses that it issues.

In *Salvatore*, the court of appeals explained that "property" is defined as "a legal 'bundle of rights'" that one possesses in connection with a particular object. 110 F.3d at 1140. The court reasoned that, because the State has the right to control whether and to whom video poker licenses are issued, the State has a property interest in the licenses. *Ibid.* The court rejected the defendants' argument that a video poker license has no value to the State, and thus cannot constitute property. It explained that "(1) the State expects to collect an up-front fee (before issuance) and a percentage of net revenues (in the future) from the putative licensee and (2) the State values its rights to control the licenses and to choose the parties to whom it issues the licenses." *Id.* at 1141. The court also rejected the defendants' contention that the State's interest in the video poker licenses is a regulatory interest, rather than a property interest, noting the State's "direct and significant financial stake * * * as issuer of the licenses" that continues throughout the term of the licenses. *Id.* at 1142. The court thus concluded that "a video poker license does not merely signify government approval of an individual's right to take part in a particular industry," but "also evinces the State's intent to participate in that industry." *Id.* at 1141.

SUMMARY OF THE ARGUMENT

The federal mail fraud statute, 18 U.S.C. 1341, reaches "any scheme or artifice to defraud, or for ob-

taining money or property by means of false or fraudulent pretenses, representations, or promises" that involves the use of the mails. The court of appeals held in this case that petitioner violated the mail fraud statute by engaging in a scheme to obtain and renew a Louisiana video poker license by making false representations to the State about the ownership of the licensee. Petitioner contends that the scheme does not come within the scope of the mail fraud statute, arguing that the video poker license was not "money or property" in the hands of the State. Petitioner is mistaken for two independent reasons. First, because the government proved that petitioner violated the second clause of the mail fraud statute by engaging in a "scheme * * * for obtaining money or property" by false or fraudulent means, the government did not also have to prove that the scheme sought to deprive the State of money or property. Second, whether or not the government was required under the mail fraud statute to prove that petitioner deprived the State of money or property, the State had a property interest in the video poker license at issue here.

1. The second clause of the mail fraud statute, which proscribes "any scheme * * * for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," does not require that the scheme be one for depriving a victim of money or property. Nothing in the common understanding of the word "obtain" suggests that such a deprivation is required. Although Congress could have narrowed the second clause by including the words "from another" at the end of the phrase "for obtaining money or property," Congress did not do so. The second clause thus encompasses cases in which a defendant, through false or fraudulent means, obtains something that might not

be "money or property" in the hands of the victim, but that becomes "money or property" in the defendant's own hands.

In *McNally* v. *United States*, 483 U.S. 350 (1987), the Court construed the first clause of the mail fraud statute to hold that a "scheme or artifice to defraud" must be aimed at depriving a victim of a right to money or property, as opposed to "intangible rights, such as the right to have public officials perform their duties honestly." *Id.* at 358. The Court rested that conclusion on the contemporaneous understanding of the phase "to defraud" in the first clause. The Court's decision thus did not turn on the "money or property" language of the second clause. Indeed, the Court observed that, "because the two [clauses] identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently." *Ibid.*

The scheme in this case was indisputably one "for obtaining money or property" under the second clause of the mail fraud statute. A video poker license, whether or not property in the hands of the State, is property in the hands of the licensee. Such a license enables the holder to engage in a lucrative business, which would otherwise be illegal, and is protected under state law against arbitrary suspension or revocation. This Court and the lower federal courts have recognized, in a variety of contexts, that a person has a property interest in a government-issued license that enables him to engage in an occupation, a business, or another money-making activity. See, *e.g.*, *Barry* v. *Barchi*, 443 U.S. 55, 64 (1979); *Mackey* v. *Montrym*, 443 U.S. 1, 10 (1979); *Bell* v. *Burson*, 402 U.S. 535, 542 (1971).

2. In any event, the State of Louisiana has a property interest in the video poker licenses that it

issues. A video poker license is plainly "something of value," *McNally*, 483 U.S. at 358, to the State. The State receives a substantial up-front payment for each video poker license, an annual licensee fee throughout the term of each license, and a percentage of the net proceeds from each licensed video poker device. In addition, the State retains a significant degree of control over each license, including over its renewal, transfer, and revocation. As the court of appeals recognized in an earlier case on this issue, "[o]ne of the main reasons for the * * * legalization of video poker [in Louisiana] was that it was considered an ongoing source of revenue for the State." *United States* v. *Salvatore*, 110 F.3d 1131, 1141 (5th Cir.), cert. denied, 522 U.S. 981 (1997). Indeed, since instituting licensed video poker in 1991, the State has reaped hundreds of millions of dollars in fees and payments from licensees.

Moreover, whether or not the State has a property interest in an unissued video poker license, this case involves a scheme not only to obtain a license, but also to renew that license, after its issuance, for three subsequent periods. The State has a property interest in a video poker license after it has been issued—and thus has become property in the hands of the licensee —because the State retains the right to payments from the licensee and the right to monitor and control the licensed activity. The State retains authority over renewal, suspension, or revocation of a license, and the State prohibits the transfer of a license to another person. One of the rights that is often associated with the ownership or possession of property is the right to control its alienation. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

Finally, petitioner contends that the State has merely a regulatory interest, not a property interest in

a video poker license, relying primarily on cases involving other sorts of government licenses, such as driver's licenses, medical licenses, and arms export licenses. But the Court need not decide in this case whether a State has a property interest in all of the varieties of licenses that it issues. The Court need conclude only that the State has a property interest in the particular variety of license at issue here—a license under which the State retains a substantial economic stake in the licensed activity.

ARGUMENT

PETITIONER'S SCHEME TO OBTAIN A VIDEO POKER LICENSE BY PROVIDING FALSE INFORMATION TO THE STATE THROUGH THE MAILS VIOLATED THE MAIL FRAUD STATUTE

The mail fraud statute prohibits (1) "any scheme or artifice to defraud" and (2) "any scheme or artifice * * * for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." A scheme to acquire a Louisiana video poker license by false representations violates the second clause of the statute, whether or not the license constitutes "property" in the hands of the State. The object of the scheme is to "obtain[]" the license, and the license indisputably constitutes "property" in the hands of the licensee. The scheme also violates the first clause of the statute. While the words "to defraud" refer to "wronging one in his property rights by dishonest methods or schemes," *McNally* v. *United States*, 483 U.S. 350, 358 (1987), the State's financial stake in and control over video poker licenses qualify as a property right protected by the mail fraud statute.

I. A SCHEME TO OBTAIN PROPERTY THROUGH FRAUDULENT MEANS VIOLATES THE MAIL FRAUD STATUTE, WHETHER OR NOT THE SCHEME WAS ONE TO DEPRIVE A VICTIM OF PROPERTY

A. The Second Clause Of 18 U.S.C. 1341 Does Not Require That A Victim Be Deprived Of Money Or Property, So Long As The Defendant Obtained Money Or Property

1. Congress enacted three prohibitions in the mail fraud statute, 18 U.S.C. 1341, and each clause of the statute proscribes a distinct sort of "scheme or artifice." The first clause, which prohibits "any scheme or artifice to defraud," derives from the original mail fraud statute enacted in 1872. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323. The second clause, which prohibits schemes "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," was added in 1909. Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. The third clause, which prohibits schemes to use the mails to distribute counterfeit money, was enacted in 1889. Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873. See Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 779-821 (1980) (Rakoff).

In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court was concerned with the first clause of Section 1341. *McNally* held that a "scheme or artifice to defraud," within the meaning of the statute, must be aimed at depriving a victim of a right to money or property, as opposed to "intangible rights, such as the right to have public officials perform their duties honestly." *Id.* at 358. The Court rested that conclusion on the common understanding of the term "to defraud"

at the time that the original mail fraud statute was enacted. *Id.* at 358-359.[2]

McNally did not construe the second clause of Section 1341, which prohibits schemes "for obtaining money or property" by false or fraudulent means. The second clause does not contain the words "to defraud" or any other textual limitation requiring the *deprivation* of a victim's money or property. Nothing in the common understanding of the word "obtain," either today or when the second clause was enacted in 1909, suggests that such a deprivation is required. See, *e.g.*, *Webster's New International Dictionary* 1485 (1917) (defining "obtain" as "[t]o get hold of by effort; to gain possession of; to procure; to acquire, in any way") (first definition).[3]

Although Congress could easily have narrowed the second clause of Section 1341 by including the words

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[2] In response to *McNally*, Congress enacted 18 U.S.C. 1346, which provides that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4508. As modified by Section 1346, the first clause of Section 1341 now encompasses certain schemes to deprive a victim of something other than money or property.

[3] See also, *e.g.*, *American Heritage Dictionary* 575 (3d ed. 1994) ("[t]o succeed in gaining possession of; acquire"); *Random House Dictionary of the English Language* 1338 (2d. ed. 1987) ("[t]o come into possession of; get, acquire, or procure, as through an effort or by a request"); *Black's Law Dictionary* 972 (5th ed. 1979) ("[t]o get hold of by effort; to get possession of; to procure; to acquire, in any way"); *Webster's New Collegiate Dictionary* 793 (1977) ("[t]o gain or attain usu. by planned action or effort"); VII James A.H. Murray, *New English Dictionary* 37 (1909) ("[t]o come into the possession or enjoyment of (something) by one's own effort, or by request; to procure or gain, as the result of purpose and effort; hence, generally, to acquire, get").

"from another" at the end of the phrase "for obtaining money or property," Congress did not do so. Congress thereby departed from the otherwise similar wording of the original English false pretenses statute, which made it a crime "by false pretence or pretences, [to] obtain *from any person* * * * money, goods, wares, or merchandizes, with intent to cheat or defraud any person." 30 Geo. II, ch. 24 (1757) (emphasis added). Congress, like the English Parliament, knew how to restrict such crimes to those in which money or property was obtained from a victim.

The second clause of Section 1341 thus encompasses those cases in which the defendant, through false or fraudulent pretenses, representations, or promises, obtains something that might not be "money or property" in the hands of the victim, but that beomes "money or property" in the defendant's own hands. As the Third Circuit has put it, the second clause "is broad enough to cover a scheme to defraud a victim of something that takes on value only in the hands of the acquirer." *United States* v. *Martinez*, 905 F.2d 709, 713, cert. denied, 498 U.S. 1017 (1990); cf. *Whitson* v. *United States*, 122 F.2d 1016, 1017 (9th Cir. 1941) (mail fraud statute reached scheme to persuade charitable organizations to enter into contract under which defendant would be their exclusive fund-raiser; court explained that under the statute "the scheme need not be one to secure moneys from others, but may be 'to defraud, or for obtaining money *or property* by means of false or fraudulent pretenses'").

McNally did not address the argument (see U.S. Br. at 17-22 in *McNally*, *supra* (No. 86-234)), that the second clause of the mail fraud statutes applies to any scheme to "obtain" money or property, even when the scheme does not seek to deprive a victim of money or

property. Rather, the Court declined to address the applicability of the second clause because the jury instructions did not require a finding that the defendants obtained property by fraudulent means. See *McNally*, 483 U.S. at 361.[4] *McNally* thus leaves open the proper construction of the second clause of Section 1341. In accordance with its plain language, that clause encompasses any scheme "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," whether or not the scheme is one for depriving a victim of money or property.

2. The conclusion that the second clause of Section 1341, unlike the first clause at the time of *McNally* (see note 2, *supra*), is not limited to schemes to deprive a victim of money or property finds support in the structure of the statute. The two clauses were, as noted above, enacted at different times. The clauses are separated, moreover, by the disjunctive "or." This Court has stated, reflecting common English usage, that "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); accord *Garcia* v. *United States*, 469 U.S. 70, 73 (1984); *FCC* v. *Pacifica Found.*, 438 U.S. 726, 739-740 (1978). Accordingly, this Court, construing an earlier version of the mail fraud statute, concluded that an indictment that charged a scheme to sell counterfeit money, a violation of what is now the third clause, did not have to include a charge that the defendant devised a scheme "to defraud," a violation of the first clause, because the statutory prohibitions were listed sepa-

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[4] The jury charge in this case did not suffer from that deficiency. See pp. 25-27, *infra*.

rately and applied to different conduct. *Streep* v. *United States*, 160 U.S. 128, 132-133 (1895).

In *McNally*, this Court acknowledged that the first and second clauses of Section 1341 may likewise have separate meanings. The Court observed that "[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently." *McNally*, 483 U.S. at 358. Thus, the Court did not rest its holding in *McNally* that the first clause of Section 1341 requires a deprivation of money or property, as opposed to "intangible rights," on the "money or property" language of the second clause. Rather, the Court derived that requirement from the common understanding of the words "to defraud" in the first clause. See *id.* at 358.

The lower federal courts have recognized, both before and after *McNally*, that the first and second clauses of Section 1341 have independent significance. See, *e.g.*, *United States* v. *Martinez*, 905 F.2d at 713 (second clause of Section 1341, but not first clause, reaches schemes that do not involve a deprivation of a victim's money or property); *United States* v. *Cronic*, 900 F.2d 1511, 1513-1514 (10th Cir. 1990) (first clause of Section 1341, but not second clause, reaches schemes to defraud that do not involve false pretenses, representations, or promises); *United States* v *Clausen*, 792 F.2d 102, 104-105 (8th Cir.) (same), cert. denied, 479 U.S. 858 (1986); *United States* v. *Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981) (same).

3. The background of the mail fraud statute does not require a narrower reading than its language suggests. It is well settled that "[o]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure" from the "plain and unambiguous meaning of the statutory language." *Salinas* v.

United States, 522 U.S. 52, 57 (1997) (internal quotation marks omitted). Nothing in the scant legislative history of the second clause of Section 1341 suggests, let alone clearly expresses, any intention that the clause be construed other than in accordance with its plain language, which encompasses "*any* scheme or artifice * * * for obtaining money or property" by the specified fraudulent means, without limitation to those schemes involving a deprivation of a victim's money or property.

In 1909, Congress enacted a comprehensive revision of the federal criminal laws that included a number of changes in the mail fraud statute. One of those changes was the insertion in the statute, after the phrase "[w]hoever, having devised or intending to devise any scheme or artifice to defraud," of the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[5]

The mail fraud amendments were enacted by the 61st Congress without any committee report or floor debate. See Rakoff, 18 Duq. L. Rev. at 816 n.205 (noting that "there is virtually no direct legislative history" of the 1909 amendments); see also *McNally*, 483 U.S. at 357-358 & n.7. The only explanations of the mail fraud

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[5] The 1909 amendments included other significant changes in the mail fraud statute. Those changes included the elimination of language characterizing the offense conduct as "misusing the post-office establishment," the elimination of the penalty provision by which courts were required to "proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme or device," and, most notably, the elimination of the requirement that the defendant intended the fraudulent scheme to be effected through use of the mails. Compare 25 Stat. 873 with 35 Stat. 1130; see Rakoff, 18 Duq. L. Rev. at 816.

amendments, which reflect the earlier views of their sponsor and of the commission that originally proposed them, do not specifically address the provision at issue here.

In explaining the mail fraud amendments during the 60th Congress, Senator Heyburn, the sponsor, dealt only with a change in the statute that involved mailings made from outside the United States, noting that the other changes were self-explanatory. See 42 Cong. Rec. 1026 (1908) (remarks of Sen. Heyburn) ("I do not think there is any other change, which is not obvious upon the face of the bill, that needs any further explanation.") (cited in *McNally*, 483 U.S. at 358 n.7). Senator Heyburn's remark suggests that the second clause should be read in accordance with common usage, for otherwise its meaning would not be self-explanatory.

The only other legislative history of the 1909 amendments is the Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States, which in 1901 proposed to the Attorney General and Congress a number of changes in the federal criminal statutes, including the addition of the language that became the second clause of the mail fraud statute. See S. Doc. No. 68, 57th Cong., 1st Sess. Pt. 2 (1901) (S. Doc. 68) (cited in *McNally*, 483 U.S. at 357-358 n.7). In the portion of the Report describing the proposed changes in the mail fraud statute, the Commission did not mention the language that became the second clause. See *id.* at xvii.[6] In the portion of the Report

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[6] The Commission appeared to allude to that provision, however, in the portion of the Report discussing the lottery statute. The Commission stated that certain words added to the lottery statute in 1890 that prohibited mailings "concerning schemes devised for the purpose of obtaining money or property under false pretenses" were being omitted "as they have respect to an offense

setting forth the text of the revised mail fraud statute, the Commission cited, in the margin, five decisions of this Court, 29 decisions of the lower federal courts, and two Attorney General opinions that had construed the existing mail fraud statute. See *id.* at 63. The Commission did not, however, explain the significance, if any, of those citations.[7]

The Court stated in *McNally* that the addition of the second clause in 1909 codified the holding in *Durland* v. *United States*, 161 U.S. 306, 313 (1896), that the mail fraud statute encompasses not only false statements of existing fact, but also false promises with respect to the future. See *McNally*, 483 U.S. at 357. The Court also stated that the language of the second clause "is based on the statement in *Durland* that the statute reaches 'everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.'" *McNally*, 483 U.S. at 358 (quoting *Durland*, 161 U.S. at 313). In fact, however, the language of the second clause is virtually identical to language added to the federal lottery statute six years before *Durland*.[8] And the legislative history of the 1909

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which is fully covered by another section, and are not essentially germane here." S. Doc. 68, at xvii.

[7] The Commission may simply have been identifying all of the reported mail fraud decisions. Some of those decisions took inconsistent positions with respect to the reach of the statute, which suggests that their mere citation does not indicate an intent to codify them. See Rakoff, 18 Duq. L. Rev. at 795-816 (contrasting the lower courts' "broad construc[illegible]ist" and "strict constructionist" approaches to the pre-1909 mail fraud statute).

[8] See Act of Sept. 19, 1890, ch. 908, §§ 1-3, 26 Stat. 465-466 (prohibiting the use of the mails in connection with, *inter alia*, "schemes devised for the purpose of obtaining money or property under false pretenses"; authorizing the Postmaster General to

amendments does not reveal an intent to codify *Durland*. No member of Congress, the Executive Branch, or the Commission to Revise and Codify the Criminal and Penal Laws described the second clause as a codification of *Durland*. The only reference to *Durland* in the legislative history is in the string citation of 36 mail fraud decisions and Attorney General opinions in the Commission's Report. If Congress had intended merely to codify the holding in *Durland*, its most natural course would have been to amend the first clause by inserting the words "whether by false pretenses, representations or promises" after the phrase "scheme or artifice to defraud." But Congress did not choose that approach. Instead, Congress added a new clause employing the disjunctive "or"—a strong indication that it intended to create an independent way of violating the statute.

The absence of any legislative history of the 1909 amendments addressing whether the second clause, like the first clause, contains a requirement that a victim be deprived of money or property—a requirement that is not evident on the face of the second clause—cannot constitute the requisite "extraordinary showing" of congressional intent needed to depart from the plain meaning of the statutory text. See *Salinas*, 522 U.S. at 57; see also *Standefer* v. *United States*, 447 U.S. 10, 20 n.12 (1980) ("an omission in the legislative history

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direct the return of registered mail involved in, *inter alia*, "any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises"; authorizing the Postmaster General to forbid the payment of postal money orders in connection with, *inter alia*, "any * * * scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises").

[cannot] nullify the plain meaning of a statute"). Indeed, the 1909 amendments included other significant changes in the mail fraud statute that likewise went unremarked upon by Congress, including the elimination of the requirement that the defendant intended the fraudulent scheme to be effected through use of the mails. Compare 25 Stat. 873 with 35 Stat. 1130; see Rakoff, 18 Duq. L. Rev. at 816.

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In sum, while the second clause of Section 1341 includes schemes to deprive a victim of his money or property, the second clause is not limited to such schemes. The plain language of the second clause authorizes convictions where the defendant acted to "obtain[] money or property by means of false or fraudulent premises, representations, or promises," whether or not he also acted to deprive a victim of money or property.[9]

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[9] Although the first question presented by the petition focuses on whether "a license that has not yet been issued constitutes 'property' of the State," Pet. i, the Court has the authority to affirm the court of appeals' judgment on the alternative ground that the second clause of Section 1341 requires a scheme "for obtaining money or property" for the defendant (or another person), and does not require a scheme for depriving a victim of money or property. See *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 419 (1977) ("respondents * * * are entitled under our precedents to urge any grounds which would lend support to the judgment below"); see also *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994) (respondent may "defend a judgment on any ground properly raised below"). Although the government did not expressly raise that argument in the district court, the government did direct the district court's attention to the Third Circuit's decision in *United States* v. *Martinez*, 905 F.2d at 712-714, which held, *inter alia*, that the second clause of Section 1341 "is broad enough to cover a scheme to defraud a victim of something

B. The Scheme In This Case Violated The Second Clause Of Section 1341 Because Petitioner Sought To "Obtain[] Property" In The Form Of A State Video Poker License

As explained above, in order to establish a violation of the second clause of Section 1341, the government must prove, *inter alia*, that the defendant's fraudulent scheme was one "for obtaining money or property." Here, the government charged petitioner with engaging in a scheme to obtain a video poker license for TSG, Ltd., a partnership in which petitioner had an undisclosed interest. A state video poker license, which has significant economic value to a licensee and which is protected against arbitrary suspension or revocation under state law, clearly constitutes property to the licensee.

1. Section 1341 does not define the term "property." Nor has the Court articulated any comprehensive definition of that term for purposes of Section 1341. The Court has recognized in other contexts, however, that the term "property" has "a naturally broad and inclusive meaning" that, according to its dictionary definition and "common usage," comprehends "anything

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that takes on value only in the hands of the acquirer," *id.* at 713. See Pet. App. 77a (noting the government's reliance on *Martinez*). The district court quoted that language from *Martinez* with approval. *Id.* at 78a. And, on appeal, the government had no need to rely on the second clause because the Fifth Circuit had already held that Section 1341 reaches schemes to obtain a video poker licenses from the State of Louisiana before the present case was briefed and argued. See *United States* v. *Salvatore*, 110 F.3d 1131, cert. denied, 522 U.S. 981 (1997). In these circumstances, and particularly given that the question is essentially one of pure statutory construction, the Court may affirm the conviction based on the second clause of Section 1314.

of material value owned or possessed." *Reiter* v. *Sonotone Corp.*, 442 U.S. at 338. No reason exists to construe the term "property" in Section 1341 any more restrictively. See *McNally*, 483 U.S. at 358 (equating "property rights" with "something of value") (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)); see also *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987) (holding that the first clause of Section 1341 applies to schemes to defraud a victim of both tangible and intangible property rights).

This Court and other courts have recognized, in a variety of contexts, that a license that permits a person to engage in an occupation, a business, or another money-making activity may constitute a form of property. For example, the Court held that an individual had a "property interest" in his state horse trainer's license that was "sufficient to invoke the protection of the Due Process Clause." *Barry* v. *Barchi*, 443 U.S. 55, 64 (1979); see also, *e.g.*, *Mackey* v. *Montrym*, 443 U.S. 1, 10 (1979) (driver's license); *Bell* v. *Burson*, 402 U.S. 535, 542 (1971) (same); *Beauchamp* v. *De Abadia*, 779 F.2d 773, 775 (1st Cir. 1985) (license to practice medicine); *Keney* v. *Derbyshire*, 718 F.2d 352, 354 (10th Cir. 1983) (same). Those decisions rest, in part, on the recognition that "[o]nce licenses are issued, * * * their continued possession may become essential in the pursuit of a livelihood." *Bell*, 402 U.S. at 539.

In addition, the courts have held that licenses to engage in a business or profession have sufficient indicia of property so as to be subject to a federal tax lien,[10]

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[10] See, *e.g.*, *In re Kimura*, 969 F.2d 806, 811 (9th Cir. 1992); *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1170-1172 (6th Cir. 1990), cert. denied, 501 U.S. 1212 (1991); *21 W. Lancaster*

that they qualify as property to which a security interest may be attached under the Uniform Commercial Code,[11] and that they constitute property of a bankrupt's estate under the Bankruptcy Code, 11 U.S.C. 541.[12] The dispositive factor in those cases was whether the license "has pecuniary value to its holder." *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1171 (6th Cir. 1990), cert. denied, 501 U.S. 1212 (1991); accord *21 W. Lancaster Corp.* v. *Main Line Restaurant, Inc.*, 790 F.2d 354 (3d Cir. 1986). While courts have also considered whether the license was transferrable for value, see, *e.g.*, *Terwilliger's Catering Plus*, 911 F.2d at 1172, the inability to transfer a particular right does not deprive it of the character of property. See *Drye* v. *United States*, 120 S. Ct. 474, 482-483 n.7 (1999) ("In recognizing that state-law rights that have pecuniary value and are transferable fall within [the federal tax lien statute], we do not mean to suggest that transferability is essential to the existence of 'property' or 'rights to property' under that section."). Even those courts that have held that an unissued license does not constitute property for purposes of the mail fraud statute acknowledge that a license may well be property in the hands of the licensee.[13]

Corp. v. *Main Line Restaurant, Inc.*, 790 F.2d 354, 356-358 (3d Cir. 1986).

[11] See, *e.g.*, *In re O'Neill's Shannon Village*, 750 F.2d 679, 682-683 (8th Cir. 1984); *Bogus* v. *American Nat'l Bank of Cheyenne*, 401 F.2d 458, 461 (10th Cir. 1968).

[12] See, *e.g.*, *Terwilliger's Catering Plus*, 911 F.2d at 1172; *In re Rainbo Express*, 179 F.2d 1, 5 (7th Cir.), cert. denied, 339 U.S. 981 (1950); *In re Fugazy Express, Inc.*, 114 B.R. 865, 869-871 (Bankr. S.D.N.Y. 1990).

[13] See, *e.g.*, *United States* v. *Granberry*, 908 F.2d 278, 280 (8th Cir. 1990), cert. denied, 500 U.S. 921 (1991); *United States* v. *Kato*,

2. A Louisiana video poker license, once obtained by the licensee, fits comfortably within the common definition of property. It is clearly something "of material value owned or possessed" by the licensee. *Reiter* v. *Sonotone, Inc.*, 442 U.S. at 338.

A license issued pursuant to the Louisiana Video Draw Poker Devices Control Law, La. Rev. Stat. Ann. § 27:301 *et seq.* (West 1989 & Supp. 2000),[14] permits the licensee to engage in the video poker business at its truck stop, restaurant, hotel, or other authorized establishment. See *id.* § 27:301(B)(8)). The licensee may thereby enhance substantially its financial return from the establishment. Indeed, because the operation of a licensed video poker establishment is so lucrative, licensees are willing to incur the thousands of dollars in application fees and annual license fees that the State imposes upon them. See *id.* § 27:311(A)-(D) and (H).[15] Although a licensee cannot transfer a video poker license, see *id.* § 27:311(G), a licensee that owns or op-

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878 F.2d 267, 269 (9th Cir. 1989); *Toulabi* v. *United States*, 875 F.2d 122, 125 (7th Cir. 1989); *United States* v. *Murphy*, 836 F.2d 248, 253-254 (6th Cir.), cert. denied, 488 U.S. 924 (1988); *United States* v. *Ferrara*, 701 F. Supp. 39, 42 (E.D.N.Y.), aff'd without opinion, 868 F.2d 1268 (2d Cir. 1988). Petitioner likewise acknowledges (Br. 10) that "a license may constitute property to the *licensee*."

[14] Since the events at issue, the Louisiana Video Draw Poker Devices Control Law has been recodified. All citations are to the current codification (West 1989 & Supp. 2000).

[15] For example, a new applicant for a video poker license for a truck stop must pay a $10,000 "processing fee" to the State. See La. Rev. Stat. Ann. § 27:311(H)(2). Once the license is obtained, the licensee must pay an annual license fee to the state and, if the licensee is also the owner of the video poker devices, a quarterly "franchise payment" based on a percentage of the net proceeds from the devices. See *id.* § 27:311(A)-(D).

erates a truck stop, as in this case, may lease or sublease any restaurant, convenience store, or other business on the premises, see *id.* § 27:306(A)(5)(b)). The location of licensed video poker devices at the truck stop may increase the value of such leases or subleases. Although the Video Gaming Division of the Louisiana State Police may revoke or suspend a video poker license on enumerated grounds, see *id.* § 27:308(B) and (C), the licensee has the right to challenge the revocation or suspension in a hearing before the Video Gaming Division and to judicial review by a state court, see *id.* § 27:310(E).

In short, a video poker license, as created under Louisiana law, has economic value for its holder and is protected against arbitrary suspension or revocation. It therefore qualifies as property under the federal mail fraud statute. See *United States* v. *Salvatore*, 110 F.3d 1131, 1141 (5th Cir.) (observing that "[i]n the hands of the licensee, the [video poker] license is 'something of value,' for it allows the licensee to operate the video poker machines and collect significant revenue from their use"), cert. denied, 522 U.S. 981 (1997).

No contrary conclusion is required by the provision of the Louisiana Video Draw Poker Devices Control Law that states that a video poker license "is not property or a protected interest under the constitutions of either the United States or the state of Louisiana." La. Rev. Stat. Ann. § 27:301(D). The question whether rights arising under state law constitute "money or property" within the meaning of Section 1341 is ultimately one of federal law. This Court recently considered the similar question of whether a taxpayer's right to a decedent's estate, which was not property under state law, nonetheless was "property" or an "interest in property" under the federal tax lien statute, 26

U.S.C. 6321. *Drye* v. *United States*, 120 S. Ct. at 481-483. The Court concluded that "[t]he question whether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law." *Id.* at 481. The Court explained that "[w]e look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation." *Ibid.*; accord, *e.g.*, *In re Kimura*, 969 F.2d 806, 810 (9th Cir. 1992) (a State cannot "defeat the federal tax lien by declaring an interest not to be property, even though the beneficial incidents of property belie its classification").

That is precisely the analysis that applies here. As explained above, a video poker license, as created under Louisiana law, has substantial economic value to the licensee. In addition, the licensee enjoys a degree of protection under Louisiana law against the arbitrary suspension or revocation of the license. The license therefore qualifies as property under the federal mail fraud statute.

C. The Indictment Charged And The Jury Necessarily Found That Petitioner Engaged In A Scheme To Obtain Property In Violation Of The Second Clause Of Section 1341

The mail fraud counts in the indictment in this case charged petitioner under both the first and second clauses of Section 1341—that is, with having "willfully devised and intended to devise a scheme and artifice to defraud, *and* to obtain property by means of false and fraudulent pretenses and representations." Supersed-

ing Indictment 26 (emphasis added).[16] The indictment then proceeded to describe the alleged scheme as one "to defraud the State of Louisiana and its citizens by fraudulently *obtaining* and renewing, through the submission of false and incomplete information, state licenses to operate video poker sites for Truck Stop Gaming, Ltd." *Ibid.* (emphasis added).

The district court's jury instructions referred the jury to the indictment's description of the alleged scheme. Jury Instructions 27 (directing the jury to pages 26-28 of the indictment). The court had already advised the jury that a copy of the indictment would be available during its deliberations. *Id.* at 16. The court paraphrased the indictment by stating that the defendants were charged with having "knowingly devised a scheme to defraud the State of Louisiana and its citizens by fraudulently obtaining and renewing, through the submission of false and incomplete information, state licenses to operate video poker sites for Truck Stop Gaming, Ltd." *Id.* at 27 (capitalization omitted). The court then instructed the jury that, in order to find the defendants guilty of mail fraud, the jury must find, among other things, that the defendants engaged in the scheme "as charged," *i.e.*, in the scheme to obtain and renew video poker licenses fraudulently. *Ibid.*

The district court went on to conflate the separate requirements of the two clauses by instructing the jury that a "'scheme to defraud' includes any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." Jury Instructions 28. But that instruction does not alter the fact that the jury was required to find all the

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[16] The relevant paragraphs of the indictment and jury instructions are set forth in appendices to this brief.

elements of a violation of the second clause—that is, that petitioner engaged in a fraudulent scheme *to obtain property* in the form of the license.

Thus, given the district court's instructions, the jury necessarily found that the petitioner engaged in a mail fraud scheme in violation of the second clause of Section 1341. On the facts of this case, the jury could not have convicted petitioner of scheming to deprive the State of the license in violation of the first clause without concluding that he schemed to obtain the license in violation of the second clause. The government's proof established that petitioner deprived the State of the license by obtaining it for an entity in which he had an undisclosed ownership interest.

II. PETITIONER VIOLATED THE MAIL FRAUD STATUTE BY ENGAGING IN A SCHEME TO DEPRIVE THE STATE OF AN INTEREST IN PROPERTY

Even if, contrary to our argument in Part I above, the government were required to prove that petitioner engaged in a scheme to deprive the State of Louisiana of money or property, that requirement was satisfied in this case. The State of Louisiana has a property interest in the video poker licenses that it issues. The licenses indisputably constitute "something of value," *McNally*, 483 U.S. at 358, to the State. The State receives a substantial sum of money in exchange for a video poker license, continues to receive payments from the licensee for so long as the license remains in effect, and retains a significant degree of control over the license, including over the renewal, transfer, or revocation of the license. Accordingly, whether or not a government has a property interest in the other sorts of licenses that it issues (*e.g.*, driver's licenses, medical

licenses, export licenses), Louisiana does have a property interest in the particular license at issue here.

We will begin with a discussion of the relevant provisions of the Louisiana Video Draw Poker Device Control Law. We will then explain why those provisions are sufficient to create a property interest on the part of the State in both unissued and issued video poker licenses.

A. The Louisiana Video Draw Poker Device Control Law Vests The State With A Financial Stake In Video Poker Licenses And With Control Over How The Licenses Are Used

Until the enactment of the Louisiana Video Draw Poker Device Control Law in 1991, video poker was illegal in Louisiana, as it remains in many States today. As the Fifth Circuit observed, "[o]ne of the main reasons for the * * * legalization of video poker [in Louisiana] was that it was considered an ongoing source of revenue for the State." *Salvatore*, 110 F.3d at 1141; accord Pet. App. 82a.

The State profits from the licensing of video poker in several ways. First, an applicant for a video poker license must pay a sizable initial "processing fee," which is $10,000 in the case of a truck stop owner; to renew a license, the State charges an additional "processing fee," which is $1,000 in the case of a truck stop owner. La. Rev. Stat. Ann. § 27:311(H)(2) and (4). In addition, the State charges each holder of a video poker license an annual fee, the amount of which depends upon the type of license held; for example, the holder of a manufacturer's license is assessed an annual fee of $20,000, the holder of a device owner's license is assessed an annual fee of $2,000, and the holder of an establishment license is assessed an annual fee of $100. *Id.* § 27:311(A).

The State also assesses an annual video poker device operation fee, imposed on the owner of the device, which amounts to $1,000 per device in the case of truck stops. *Id.* § 27:311(A)(5)(c) and (B). A truck stop may have as many as 50 video poker devices, depending on the amount of fuel sold at the truck stop. *Id.* § 27:306(A)(4)(b). In 1995, the year in which petitioner and his co-defendants submitted the final license renewal application for TSG, Ltd., the State received a total of $10.8 million from those various fees. See Louisiana Legislative Fiscal Office, *State Gaming Revenue—Sources and Uses* 1 (Dec. 20, 1999) (*State Gaming Revenue*).

The State's chief source of revenue from video poker, however, is the quarterly "franchise payment," which consists of a percentage of the net revenue from each licensed video poker device operated in the State. La. Rev. Stat. Ann. § 27:311(D). During the period at issue in this case (1992-1995), the State received between 22.5% and 27.8% of the net revenue from each video poker device. *State Gaming Revenue* 1. Under current law, the State receives as much as 32.5% of the net revenue from video poker devices at truck stops and as much as 26% of the net revenue from video poker devices at restaurants, hotels, bars, and other such establishments. La. Rev. Stat. Ann. § 27:311(D). In 1995, the State received a total of $141.5 million in such franchise payments; by 1999, the State's annual receipts from franchise payments had grown to $188.6 million. *State Gaming Revenue* 1. While some of the State's video poker revenue is allocated to gaming enforcement and related activity, the vast majority goes to the State General Fund ($109.6 million in 1995; $142.1 million in 1999) and to local government ($30.3 million in 1995; $43.4 million in 1999). *Ibid.*; see La. Rev. Stat. Ann. §

27:312 (specifying division of funds received by the State from video poker).[17]

The State, through the Video Gaming Division of the Louisiana State Police, exercises significant control over virtually every aspect of the video poker industry. The State regulates, for example, how the game of video poker is played (La. Rev. Stat. Ann. § 27:302(A)(5)(a)-(g)); the amount of money that may be played and the value of prizes (*id.* § 27:304); the expected payback (*id.* § 27:305(A)); the specifications of video poker devices (*id.* § 27:302(A)(1)-(4) and (5)(h)-(o)); the sorts of establishments that may be licensed for video poker (*id.* § 27:306(A)(2)-(4)); the physical placement and number of devices permitted within a licensed establishment (*id.* §§ 27:302(D), 27:306(A)(2) and (4)(a)); and physical security at licensed establishments (*id.* § 27:308(E)(5)).

The licensing requirements that the State has imposed on those who seek to participate in the video poker industry in Louisiana are specifically designed to protect the economic viability of the industry. The section of the Louisiana Video Draw Poker Device Control Law dealing with license qualifications recognizes "the importance of a controlled gaming industry to the development of the economy of the state of Louisiana." La. Rev. Stat. Ann. § 27:306(A)(1). It further recog-

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[17] On July 1, 1999, video poker was discontinued in 33 of Louisiana's 64 parishes, in accordance with the results of local referenda conducted in 1996. See *Gambling: The Trouble Is, It Makes Money*, The Economist, July 31, 1999. Immediately before the shutdown, there were 15,914 video poker devices operating in Louisiana, 11,040 of which remained operating the next day. As of January 30, 2000, the number of operating video poker devices in Louisiana had risen to 11,792. Alan Sayre, *Video Poker Edges Back In La.*, The Charleston Gazette, Feb. 28, 2000.

nizes that "the success and growth of gaming are dependent upon public confidence and trust that * * * video draw poker gaming activities are conducted honestly and are free from criminal and corruptive elements." *Ibid.* Accordingly, the central requirement of the video poker licensing scheme is that applicants demonstrate their "suitability"—that is, that the applicant is a person of "good character, honesty, and integrity"; that the applicant's "prior activities, arrest or criminal record if any, reputation, habits, and associations do not pose a threat to the public interest of [Louisiana] or to the effective regulation of video draw poker"; that the applicant is likely to conduct the video gaming business "in complete compliance" with state law; and that the applicant is not delinquent in tax or other financial obligations to the State or a local government. *Id.* § 27:310(B).

The State retains a significant degree of control over video poker licenses after they have been issued. The State may revoke or suspend the license of any person who violates a provision of the Louisiana Video Draw Poker Device Control Law or the regulations promulgated by the Video Gaming Division. La. Rev. Stat. Ann. § 27:308(B). The State also may revoke or suspend the license of any person who "did not meet, at the time of application, or does not continue to meet the suitability or other requirements" for a license. *Id.* § 27:308(C). The State prohibits the transfer of a video gaming license to another person except in limited circumstances with the approval of the State. *Id.* § 27:311(G); cf. *id.* § 27:306(D)(2) (permitting transfer of license from one truck stop to another in limited circumstances).

B. The State Has A Property Interest In Video Poker Licenses

A video poker license has economic value to the State. As explained above, a video poker license represents the State's right, under the Louisiana Video Draw Poker Device Control Law, to a stream of payments from the licensee. Those payments consist of the initial fees payable at the time of the application for the license, the annual license fees, and, where the licensee is the owner of video poker devices, quarterly franchise payments based on a percentage of the net proceeds from each device. See La. Rev. Stat. Ann. § 27:311(A)-(D). The State controls who receives a video poker license, whether the license may be renewed, whether the license may be transferred, and, if a violation of state law is suspected, whether the license is suspended or revoked. See *id.* §§ 27:306, 27:308(B) and (C), 27:311(G)

1. The State has a property interest in a video poker license even before the license has been issued because, as the court of appeals put it, "the State expects to collect an up-front fee (before issuance) and a percentage of net revenues (in the future) from the putative licensee." *Salvatore*, 110 F.3d at 1141. Indeed, the State receives the first installment of revenue—the application fee and the initial annual license fee—at the time that the application for the license is filed.[18] The license continues to generate revenue for the State

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[18] See La. Admin. Code title 42, § 2405(A)(2) (2000) (application for a video poker license "is not complete nor is it considered filed with the division unless it is submitted with the appropriate fee"); *id.* § 2409(A)(1) and (2) (requiring applicants for video poker licenses to pay, "[u]pon application, a nonrefundable annual [licensing] fee," as specified in La. Rev. Stat. Ann. § 27:311(A)).

until the license expires or until the State suspends or revokes the license for cause. The State projects its anticipated revenue from video poker licenses into the future, see, *e.g.*, *State Gaming Revenue* 1, and thus is in a position to plan its future spending based on those projections.

When the State issues a video poker license, it is effectively "selling" the license to the applicant, in return for the payments that the State has already received and the right to additional payments over the term of the license. The State is thus receiving "money or property" in exchange for the license. And the applicant is receiving something that, as explained above (see pp. 20-25, *supra*), indisputably constitutes property as to him. It would be curious to conclude that, although the transaction involves an exchange by the applicant of one form of property (*i.e.*, money) for another form of property (*i.e.*, the license), the transaction does not also involve an exchange of property for property by the State. See *United States* v. *Frost*, 125 F.3d 346, 367 (6th Cir. 1997) (holding that a state university has a property interest in an unissued degree because, *inter alia*, "in return for tuition money and scholarly effort, [the university] agrees to provide an education and a degree"), cert. denied, 525 U.S. 810 (1998); cf. *United States* v. *Novod*, 923 F.2d 970, 974 (2d Cir.) (dicta) (two judges suggest that the license award process "is tantamount to a contractual transaction where a buyer and seller agree on a mutually satisfactory exchange of consideration"), cert. denied, 500 U.S. 919 (1991).

The State's interest in a video poker license that it has not yet issued also resembles, in certain respects, a patent holder's interest in a patent that it has not yet licensed. It is well established that patents are a

"species of property." *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 642 (1999); see *Consolidated Fruit Jar Co.* v. *Wright*, 94 U.S. 92, 96 (1877) ("A patent for an invention is as much property as a patent for land."). "'A patent,' said Mr. Justice Holmes, 'is property carried to the highest degree of abstraction—a right in rem to exclude, without a physical object or content.'" *Mercoid Corp.* v. *Mid-Continent Inv. Co.*, 320 U.S. 661, 678 (1944) (Jackson, J., dissenting) (quoting 1 Holmes-Pollock Letters 53); accord *Transparent-Wrap Mach. Corp.* v. *Stokes & Smith Co.*, 329 U.S. 637, 643 (1947) (describing a patent as "the exclusive right to make, use, and vend the invention or discovery for a limited period") (internal quotation marks omitted); see also *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979) (the right of exclusion is among "the most essential sticks in the bundle of rights that are commonly characterized as property"). Similarly, the State's rights with respect to video poker in Louisiana include the right to exclude others from that business. The State has an exclusive right (subject to any previously issued licenses) to operate the video poker business itself; the State also has the right to prohibit all other persons within the State from engaging in that business, or to condition participation on compliance with whatever requirements the State imposes. See pp. 37-39, *infra*. And, just as one of the most important attributes of a patent is the ability to exploit it for commercial gain through licensing, one of the most important attributes of Louisiana's authority over video poker is the ability to exploit it financially through licensing. In both cases, the power to license others to participate in a particular economic activity, which they could not engage in

absent the license, furthers economic interests that qualify as property.

2. In any event, the indictment in this case charged that petitioner and his co-defendants committed mail fraud by engaging in a scheme not only to obtain the video poker license for TSG, Ltd., initially in 1992, but also to obtain renewals of the license in 1993, 1994, and 1995. Superseding Indictment 26-28. The jury was instructed accordingly. Jury Instructions 27. Whether or not the State had a property interest in the license before its issuance, the State did have a property interest in the license once it had been issued, and thus became property as to the licensee.

The State has an ongoing economic stake in a video poker license issued under the Louisiana Video Draw Poker Device Control Law. As explained above, the State is entitled to an annual license fee from each video poker licensee, which ranges from $20,000 to $100 depending on the category of license, and to quarterly franchise payments based on a percentage of the net revenues from each licensed video poker device. See La. Rev. Stat. Ann. § 27:311(A) and (D). The State is thus essentially in business with the licensee so long as the license remains in effect. The State protects its interest in the business through extensive regulation and monitoring of the licensed activity, including, for example, requiring that all licensed video poker devices be linked to a central state computer so that a record can be maintained of all money taken in and paid out in winnings. See *id.* § 27:302(A)(5)(o).

Moreover, the State, not the licensee, controls the alienation of a video poker license. See La. Rev. Stat. Ann. § 27:311(G) (a video poker license "shall be personal to the licensee to whom it was issued and shall not

be transferable").[19] The State also may suspend or revoke a license at any time, if the State determines that the licensee has violated the statute or failed to satisfy the suitability requirements. *Id.* § 27:308(B) and (C). It is well settled that a right often associated with the ownership of property is the right to control its alienation. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (describing "property rights" as including the right to "dispose of" property); accord *Salvatore*, 110 F.3d at 1140; cf. *Carpenter*, 484 U.S. at 26 (concluding that the *Wall Street Journal* had a property right in controlling the dissemination of its confidential business information).

In *United States* v. *Bucuvalas*, 970 F.2d 937, 945 (1st Cir. 1992), cert. denied, 507 U.S. 959 (1993), the court of appeals held that, once the City of Boston issued liquor and entertainment licenses to the defendants, the City had a property interest in those licenses for purposes of the mail fraud statute, because the licenses had to be renewed annually, could be revoked by the City based on the occurrence of prescribed contingencies, and could be transferred only with the City's approval. "[A]t the very least," the court explained, "defendants repeatedly deprived the City of Boston of its reversionary interest in the fraudulently obtained licenses by renewing and transferring the licenses in the names of straw owners." *Ibid.* Similarly, here, even if the video poker license did not become property until the State

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[19] See also, *e.g.*, La. Rev. Stat. Ann. § 27:306(E) (if an establishment licensed for video poker is sold, the purchaser must apply for a new license, although the establishment may continue to offer video poker in the interim); *id.* § 27:306(D)(2)(b) (authorizing truck stop operators that have lost their leases to transfer video poker licenses to other establishments in limited circumstances).

issued the license to TSG, Ltd., the State thereafter possessed a property interest in the license, because the State, not TSG, Ltd., retained control over whether, and in what circumstances, the license could be retained, revoked, transferred, or renewed. Petitioner and his co-defendants, by submitting license renewal applications that concealed the true owners of TSG, Ltd., deprived the State of that right.

3. A video poker license, as created under Louisiana law, may also be viewed as a franchise—that is, a right held exclusively by the government to engage in a particular business activity, which the government may exercise directly or delegate to private parties "acting under such conditions and regulations as the government may impose." *California* v. *Central Pac. R.R.*, 127 U.S. 1, 40-41 (1888); see *id.* at 40 (reciting traditional definition of a "franchise" as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject") (quoting 2 W. Blackstone, *Commentaries* 37).[20] As the Court has explained, a franchise "belong[s] to the State," which "could carry on the business itself or select one or several agents to do so." *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U.S. 650, 660 (1885). A franchise, "when conferred upon the citizen," thus remains "[a] right which belongs to the government." *Borre* v. *United States*, 940 F.2d 215, 220

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[20] In *Frost* v. *Corporation Commission*, 278 U.S. 515, 520 (1929), the Court offered various examples of franchises: "the right to supply gas or water to a municipality and its inhabitants, the right to carry on the business of a telephone system, to operate a railroad, a street railway, city water works or gas works, to build a bridge, operate a ferry, and to collect tolls therefor." The Court added that "these are but illustrations of a more comprehensive list," *ibid.*, which the Court held to include the right to operate a cotton gin at issue in that case, *id.* at 520-521.

(7th Cir. 1991); accord *Maestri* v. *Board of Assessors*, 34 So. 658, 661 (La. 1903) ("a franchise is defined to be a royal privilege in the hands of a subject").[21] The Court has recognized, albeit in addressing the rights of franchisees, that franchises "have elements of property." *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118, 139 (1939); accord *Frost* v. *Corporation Comm'n*, 278 U.S. 515, 521 (1929).

In *Borre*, the court of appeals held that a municipality had a property interest in a cable television franchise, which the court described as "a delegation of a governmental function to private entities to be performed in the furtherance of the public welfare." 940 F.2d at 220 (quoting 1 D. Ferris et al., *Cable Television Law* § 13.13, at 13-68.11 (1990)). The court noted that the municipality could have chosen to operate the cable television franchise itself rather than award it to a private party. *Id.* at 220-221; see also *United States* v. *Italiano*, 894 F.2d 1280, 1285 n.6 (11th Cir. 1990) ("Clearly the cable television franchise held by the County of Hillsborough for the people of that county to be awarded to some commercial entity is 'property,' and the attempt by appellant to secure the cable television franchise by bribery is a scheme to deprive the county and its people of that property.").

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[21] Thus, the government retains authority over whether a franchise may be transferred. See *Louisiana* v. *Morgan*, 28 La. Ann. 482, 488 ("[T]he franchises of a railroad corporation cannot be alienated without the consent of the State which granted them. As all franchises belong exclusively to the State, no one will be permitted to possess and administer any of them without the consent of the State."), aff'd, 93 U.S. 217 (1876); accord *Branch* v. *Jesup*, 106 U.S. 468, 478 (1883) (observing that franchises "are generally inalienable" unless the government has provided otherwise).

The right to engage in the video poker business, like the right to engage in the cable television business, is a "right which belongs to the government," to be exercised by the government alone or "conferred on a citizen." *Borre*, 940 F.2d at 220. The State of Louisiana could, of course, have chosen to operate the video poker business itself. It is not unusual for States to conduct their own gaming operations—such as lotteries, keno games,[22] and sports wagering[23]—as a means of raising public revenues. Indeed, in Oregon, video poker is run by the State, which owns the video poker devices and licenses them to proprietors in return for a share of the profits. See Or. Rev. Stat. § 461.215 (1997). By contrast, Louisiana chose to confer the authority to operate video poker devices on suitable private parties. In return, the State receives valuable consideration, in the forms of initial and annual license fees and a continuing share in the revenue generated by video poker within the State, and retains a significant degree of control over the video poker industry. Indeed, by characterizing the State's share of the net proceeds from a licensed video poker device as a "franchise payment," see La. Rev. Stat. Ann. § 27:311(D), the State has indicated that it views video poker as a government franchise.

4. Petitioner contends (Br. 17-22) that the State of Louisiana has merely a regulatory interest, not a property interest, in a video poker license. He relies primarily on cases involving other sorts of government licenses, such as driver's licenses, medical licenses, and

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[22] See, *e.g.*, Md. Regs. Code title 14, § 14.01.03.12 (2000); 77 Md. Op. Att'y Gen. 82 (1992).

[23] See, *e.g.*, N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 502 (McKinney 2000) (off-tracking betting); Or. Rev. Stat. §§ 461.213, 461.543 (1997) (sports wagering).

export licenses. But the Court need not decide in this case whether a State has a property interest in all of the varieties of licenses that it issues. The Court need conclude only that the State of Louisiana has an interest in the particular variety of license at issue here —a license under which the State retains a substantial economic stake in the licensed activity. None of the cases on which petitioner relies involved such a license. See *United States* v. *Shotts*, 145 F.3d 1289, 1294 (11th Cir. 1998) (concluding that "[a] particular license may signify nothing more than an intent to regulate, while another type of license may signify the state's intent to participate in that industry") (citing *Salvatore*, 110 F.3d at 1141).

A video poker license does not constitute a mere "promise not to interfere" with the licensee's conduct of a business, profession, or other activity, as may the sorts of licenses that have been described as reflecting "a regulatory rather than property interest" on the part of the government. *E.g.*, *Toulabi* v. *United States*, 875 F.2d 122, 125 (7th Cir. 1989). As the court of appeals explained in *Salvatore*, "Louisiana has much more than a regulatory interest in the video poker licenses; it has a direct and significant financial stake in its role as issuer of the licenses." 110 F.3d at 1142. Indeed, the Seventh Circuit, after concluding in *Toulabi* that a municipality did not have a property interest in a taxi driver's license, concluded that a municipality did have a property interest in the cable television franchise, which the court found to "represent[] far more than a mere 'promise not to interfere' by the government." *Borre*, 940 F.2d at 219-221. As explained above, a video poker license is analogous to a franchise: a privilege conferred on a private party to operate a particular business in return for valuable consideration.

5. Petitioner also argues (Br. 22-26) that the Court should construe the mail fraud statute to exclude schemes to obtain a state license by fraudulent means, invoking the Court's statement in *United States* v. *Bass*, 404 U.S. 336, 349 (1971), that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." Congress has left no doubt, however, that Section 1341 "reach[es] *any* scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." *Carpenter*, 484 U.S. at 27 (emphasis added); see also *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, 'any' has an expansive meaning."). In *McNally*, the Court recognized that "[t]he mail fraud statute clearly protects property rights," 483 U.S. at 356, and "is to be interpreted broadly insofar as property rights are concerned," *ibid.* Accordingly, to the extent that Louisiana has a property right in a video poker license, as created under state law, Congress has clearly expressed its purpose to protect that right under Section 1341. Cf. *Salinas*, 522 U.S. at 59-60.

Nothing in the text or history of the mail fraud statute provides any justification for varying the scope of protected property rights depending on the identity of the victim. Indeed, given that schemes to defraud a State of money or property rights often involve powerful state officials (as the indictment charged in this case), the State may not be well positioned to investigate or prosecute the fraud itself. Section 1341 is particularly necessary in such cases to protect against frauds involving the use of the U.S. mails, which have historically been an area of particular federal concern. See, *e.g.*, *In re Rapier*, 143 U.S. 110, 134 (1892) ("It is not necessary that Congress should have the power to

deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality."); see also *Badders* v. *United States*, 240 U.S. 391, 393 (1916); *Ex parte Jackson*, 96 U.S. 727 (1877).

C. Congress's Enactment Of 18 U.S.C. 1346 Has No Bearing On Any Issue Presented In This Case

Petitioner finally contends (Br. 37) that the post-*McNally* enactment of 18 U.S.C. 1346—which expanded the definition of a "scheme or artifice to defraud" under the mail, wire, and bank fraud statutes to include "a scheme or artifice to deprive another of the intangible right of honest services"—"demonstrates that [Congress] did not intend the mail fraud statute to cover deceptions in state license applications." But the intent of the Congress that enacted Section 1346 in 1988 is irrelevant to any issue in this case. This case was not charged under Section 1346 as involving a scheme to deprive Louisiana or its citizens of an intangible right. The case was instead charged as involving "a scheme and artifice to defraud, and to obtain property by means of false and fraudulent pretenses and representations" in violation of 18 U.S.C. 1341 and 18 U.S.C. 2. Superseding Indictment 26, 28. The property at issue was specifically identified in the indictment as "state licenses to operate video poker sites for Truck Stop Gaming, Ltd." *Id.* at 26. The indictment nowhere mentioned Section 1346 or "intangible rights."

Congress did not purport in the post-*McNally* legislation to restrict the definition of property rights under the existing mail, wire, and bank fraud statutes. Rather, Congress included an additional category of rights, which the Court had held in *McNally* could not

be the object of a "scheme to defraud" as then understood, within the protection of those statutes. See 134 Cong. Rec. 33,297 (1988) (statement of Rep. Conyers) (Section 1346 "is intended merely to overturn the McNally decision. No other change in the law is intended.").[24]

Petitioner argues (Br. 37) that Congress would have included in Section 1346 an "intangible right * * * to run a licensing program based on full and complete information" if Congress had intended that the mail fraud statute reach schemes to obtain a government license by fraud. Petitioner reads too much into Congress's silence. Congress may have anticipated that most schemes involving fraud in license applications could be reached without further statutory addition—either under the existing mail and wire fraud statutes, at least to the extent that the scheme involved a license

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[24] Section 1346 was adopted as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, Subtitle O, § 7603(a), 102 Stat. 4508. The provision was not discussed in a committee report or debated on the floor of either House. See Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 So. Cal. L. Rev. 367, 488-489 nn.450-452 (1989) (discussing legislative history of Section 1346). The first statement quoted in the text is from Representative Conyers, the chairman of the Subcommittee on Criminal Justice of the House Judiciary Committee, which had held hearings on the impact of *McNally* on federal criminal prosecutions. See 134 Cong. Rec. at 33,296-33,297. Representative Conyers, while supporting the provision that became Section 1346, voted against the Anti-Drug Abuse Act. *Id.* at 33,318. No other member of Congress expressed any disagreement with Representative Conyers' statement that Section 1346 was not intended to effect any change in the law other than the overturning of *McNally*. See *id.* at 32,708 (statement of Senator Biden) (Section 1346 "overturns the decision in *McNally*").

in which the government had a property interest, or under the new "honest services" provision, to the extent that the scheme involved the corruption of government officials. See, *e.g.*, *United States* v. *Alkins*, 925 F.2d 541, 549 (2d Cir. 1991 (affirming mail fraud conviction of state employees and others under Section 1346 for engaging in a scheme to issue fraudulent vehicle registrations). Or Congress may (if it even recognized that any question existed) simply have chosen to address license procurement schemes at a later time, or to leave the question to the courts in the first instance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2000

APPENDIX A

Section 1341 of Title 18 of the United States Code provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

APPENDIX B

The mail fraud count of the superseding indictment alleged as follows:

COUNTS 3 THROUGH 6
(MAIL FRAUD)

A. THE SCHEME:

Beginning on an exact date unknown, but in or before February 1992, and continuing until the date of this indictment, in the Eastern District of Louisiana, and elsewhere, the listed defendants, and others, known and unknown to the Grand Jury, knowingly and willfully devised and intended to devise a scheme and artifice to defraud, and to obtain property by means of false and fraudulent pretenses and representations; that is, to defraud the State of Louisiana and its citizens by fraudulently obtaining and renewing, through the submission of false and incomplete information, state licenses to operate video poker sites for Truck Stop Gaming, Ltd.

It was part of the scheme and artifice to defraud, that, in connection with attempts to obtain licenses and license renewals for Truck Stop Gaming, Ltd., the defendants filed, and caused to be filed, with the Louisiana State Police applications, affidavits, and other documents which concealed and failed to disclose:

1. Understandings and agreements with unreported parties:

   a. pledging and assigning interests in Truck Stop Gaming, Ltd;

b. agreeing to hold interests in Truck Stop Gaming, Ltd., as an "agent, nominee or otherwise" on behalf of said unreported party; and

c. agreeing to transfer said interests, on some future date, to said unreported party; and

2. other factors that could impact the ability of the true owners to obtain licenses.

It was further part of the scheme and artifice to defraud that the defendants filed income tax returns which listed the GOODSON children as owning, directly and indirectly, 100% of Truck Stop Gaming, Ltd.

B. MAILINGS

On or about the dates listed below, in the Eastern District of Louisiana and elsewhere, the listed defendants, for the purpose of executing the scheme set forth above in Part A, and attempting to do so, did knowingly cause to be delivered by the United States Postal Service according to the directions thereon, and did take and receive, and cause to be taken and received from an authorized depository for mail matter, the following items having been mailed from the Department of Public Safety and Corrections, Office of Louisiana State Police, Baton Rouge, Louisiana, to

Truck Stop Gaming, Ltd., P.O. Box 1361, Slidell, Louisiana, to wit:

COUNT	DATE	DEFENDANTS	ITEM MAILED FROM/TO
3	05/18/92	CARL CLEVELAND FRED GOODSON MARIA GOODSON	License No. 5207600111, Office Tracking No. 000142, issued to Truck Stop Gaming, Ltd.
4	07/07/93	CARL CLEVELAND FRED GOODSON MARIA GOODSON JOE MORGAN	License No. 5207600111, Office Tracking No. 013616, issued to Truck Stop Gaming, Ltd.
5	06/02/94	CARL CLEVELAND FRED GOODSON MARIA GOODSON JOE MORGAN	License No. 5207600111, Office Tracking No. 020606, issued to Truck Stop Gaming, Ltd.
6	05/25/95	CARL CLEVELAND FRED GOODSON MARIA GOODSON JOE MORGAN	License No. 5207600111, Office Tracking No. 014718, issued to Truck Stop Gaming, Ltd.

All in violation of Title 18, United States Code, Sections 1341 and 2.

APPENDIX C

The district court's instructions to the jury on the mail fraud count stated as follows:

MAIL FRAUD: COUNTS 3 THROUGH 6 AND "RACKETEERING ACTS" 1a THROUGH 1d

TITLE 18, UNITED STATES CODE, SECTION 1341, MAKES IT A CRIME FOR ANYONE TO USE THE UNITED STATES MAILS IN CARRYING OUT A SCHEME TO DEFRAUD. FOUR OF THE SIX DEFENDANTS ARE CHARGED WITH MAIL FRAUD IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 1341. DEFENDANTS **CARL CLEVELAND, FRED GOODSON, AND MARIA GOODSON** ARE EACH CHARGED WITH MAIL FRAUD IN COUNTS 3, 4, 5, AND 6 AND "RACKETEERING ACTS" 1(a), 1(b), 1(c), AND 1(d). **JOE MORGAN** IS CHARGED WITH MAIL FRAUD IN COUNTS 5 AND 6 AND RICO PREDICATE ACTS 1(c) AND 1(d). THE SUPERSEDING INDICTMENT CHARGES THAT THE LISTED DEFENDANTS KNOWINGLY DEVISED A SCHEME TO DEFRAUD THE STATE OF LOUISIANA AND ITS CITIZENS BY FRAUDULENTLY OBTAINING AND RENEWING, THROUGH THE SUBMISSION OF FALSE AND INCOMPLETE INFORMATION, STATE LICENSES TO OPERATE VIDEO POKER SITES FOR TRUCK STOP GAMING, LTD. THE MAIL FRAUD CHARGES ARE SET FORTH ON PAGES 26-28 OF THE SUPERSEDING INDICTMENT.

FOR YOU TO FIND A DEFENDANT GUILTY OF THE CRIME OF MAIL FRAUD, YOU MUST BE CONVINCED THAT THE GOVERNMENT HAS PROVED

EACH OF THE FOLLOWING ELEMENTS BEYOND A REASONABLE DOUBT AS TO THAT DEFENDANT:

FIRST, THAT THE DEFENDANT UNDER CONSIDERATION KNOWINGLY CREATED A SCHEME TO DEFRAUD, AS CHARGED IN THE INDICTMENT;

SECOND, THAT THE DEFENDANT UNDER CONSIDERATION ACTED WITH A SPECIFIC INTENT TO COMMIT FRAUD;

THIRD, THAT THE DEFENDANT UNDER CONSIDERATION MAILED SOMETHING OR CAUSED ANOTHER PERSON TO MAIL SOMETHING FOR THE PURPOSE OF CARRYING OUT THE SCHEME.

A "SCHEME TO DEFRAUD" INCLUDES ANY SCHEME TO DEPRIVE ANOTHER OF MONEY OR PROPERTY BY MEANS OF FALSE OR FRAUDULENT PRETENSES, REPRESENTATIONS, OR PROMISES. THE SCHEME MUST INVOLVE FALSE OR FRAUDULENT REPRESENTATIONS OR OMISSIONS REASONABLY CALCULATED TO DECEIVE PERSONS OF ORDINARY PRUDENCE AND COMPREHENSION.

FOR THE PURPOSES OF MAIL FRAUD, A REPRESENTATION MAY BE "FALSE" WHEN IT CONSTITUTES A HALF TRUTH, OR EFFECTIVELY CONCEALS A MATERIAL FACT, PROVIDED IT IS MADE WITH INTENT TO DEFRAUD.

IT IS NOT NECESSARY THAT THE GOVERNMENT PROVE ALL OF THE DETAILS ALLEGED IN THE INDICTMENT CONCERNING THE PRECISE NATURE AND PURPOSE OF THE SCHEME, OR THAT THE MATERIAL MAILED WAS ITSELF FALSE OR

FRAUDULENT, OR THAT THE ALLEGED SCHEME ACTUALLY SUCCEEDED IN DEFRAUDING ANYONE, OR THAT THE USE OF THE MAIL WAS INTENDED AS THE SPECIFIC OR EXCLUSIVE MEANS OF ACCOMPLISHING THE ALLEGED FRAUD.

WHAT MUST BE PROVED BEYOND A REASONABLE DOUBT IS THAT THE DEFENDANT KNOWINGLY DEVISED OR INTENDED TO DEVISE A SCHEME TO DEFRAUD THAT WAS SUBSTANTIALLY THE SAME AS THE ONE ALLEGED IN THE INDICTMENT AND THAT THE USE OF THE U.S. MAILS WAS CLOSELY RELATED TO THE SCHEME, IN THAT THE DEFENDANT EITHER MAILED SOMETHING OR CAUSED IT TO BE MAILED IN AN ATTEMPT TO EXECUTE OR CARRY OUT THE SCHEME. TO "CAUSE" THE MAILS TO BE USED IS TO DO AN ACT WITH KNOWLEDGE THAT THE USE OF THE MAILS WILL FOLLOW IN THE ORDINARY COURSE OF BUSINESS OR WHERE SUCH USE CAN REASONABLY BE FORESEEN. EACH SEPARATE USE OF THE MAILS IN FURTHERANCE OF A SCHEME TO DEFRAUD CONSTITUTES A SEPARATE OFFENSE.

Supreme Court, U.S.
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No. 99-804

IN THE

Supreme Court of the United States

CARL W. CLEVELAND,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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I. THE FIRST QUESTION BRIEFED BY THE GOVERNMENT WAS NOT RAISED OR DECIDED BELOW, NOR MENTIONED IN THE GOVERNMENT'S OPPOSITION TO CERTIORARI.

The Court's grant of certiorari in this case was "limited to Question 1 as presented by the petition." 120 S. Ct. 1416 (2000). That question reads: "Can alleged false statements or omissions in applications for state licenses be the basis for federal mail or wire fraud charges, on the theory that a license that has not yet been issued constitutes 'property' of the State, of which State is deprived when it issues the license?" Pet. Cert. i.[1] Petitioner's opening brief and the briefs of *amici curiae* are directed to that question.

The Government would now have the Court address an entirely different question: Does the mail fraud statute allow a conviction without proof of a scheme aimed at depriving another of money, property, or the right of honest services? *See* U.S. Br. 6-7, 10-27. This question was nowhere mentioned in the Government's brief in opposition to the petition for certiorari, and the Government never raised the issue in the courts below. The Government nonetheless urges this Court to address the issue, to hold that no intended deprivation of money, property, or the right of honest services is required, and to affirm on this alternate ground without reaching the question on which certiorari was granted. The Government's belated attempt to inject a new question into the case is contrary to the well-established practices of this Court. *See, e.g., Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 457 (1995) ("As a court of review, not one of first view, we will entertain issues withheld until merits briefing 'only in the most exceptional cases.'" (quoting *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992)).

Although the Court has the power to consider an issue first presented to it in a respondent's merits brief, with rare exception the Court has declined to exercise that power. For exam-

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[1] Petitioner also had sought certiorari on a question relating to the absence of an instruction to the jury that materiality is an element of mail fraud.

ple, in *Howlett v. Rose*, 496 U.S. 356 (1990), the Court had granted certiorari to decide whether a state-law defense of sovereign immunity was available to a school board otherwise subject to suit in a Florida court even though such a defense would have been unavailable in federal court. Respondents then argued in their brief on the merits that the school board was an arm of the State and thus not a "person" under 42 U.S.C. § 1983. 496 U.S. at 381 n.24. Because the contention had not been presented in respondents' brief in opposition to certiorari, this Court declined to address it. *See id. See also, e.g., South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 171 (1999); *Okla. City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

It is also the settled practice of this Court not to consider questions which were not fully litigated and decided in the lower courts. For example, in *Yee v. City of Escondido*, the Court declined to address an issue not raised below because "Prudence . . . dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." 503 U.S. at 538. *See also, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996); *Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990). The Government never contended in either the District Court or the Court of Appeals that § 1341 reaches schemes which do not have as their object a deprivation of money, property, or the right of honest services.[2]

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[2] The Government notes that in the District Court it cited *United States v. Martinez*, 905 F.2d 709 (3d Cir. 1990), which asserts that § 1341 "is broad enough to cover a scheme to defraud a victim of something that takes on value only in the hands of the acquirer." 905 F.2d at 713. But the Government cited *Martinez*, not for that proposition, but as support for resolving in the Government's favor "the question of whether governmental licenses are property under § 1341." R. 615-16. *See also* R. 614 ("A reading of the indictment shows that it sufficiently alleges deprivation of property."). Although the Government seeks to explain its failure to raise its new claim in the Court of Appeals by pointing to that court's prior decision in *United States v. Salvatore*, 110 F.3d 1131 (5th Cir. 1997), the

The decisions relied upon by the Government (*see* U.S. Br. 19 n.9) do not support its effort to have this Court decide an entirely new question. In *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), the Court did not decide a question first raised in a respondent's merits brief. The respondents had contended in the Court of Appeals that additional constitutional violations should have been found by the District Court, but the Court of Appeals had not addressed that contention. Stressing "the confusion at various stages in this case . . . as to the applicable principles and appropriate relief," this Court made clear that the claim of additional violations should be considered on remand. *Id.* at 419. Here, in contrast, the Government raises a contention it never presented to the lower courts.

The language the Government quotes from *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994), is taken out of context. The full sentence reads: "A prevailing party *need not cross-petition* to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment." *Id.* at 364 (emphasis added). *Northwest Airlines* merely indicates that the Government was not required to file a cross-petition – not that the Court should consider a claim the Government never raised in the lower courts or in its brief in opposition to certiorari.

Although the Court has addressed issues beyond the scope of the questions presented "in the most exceptional cases," *Yee*, 503 U.S. at 535, this is not such a case. There is not even a conflict among the circuits on the question the Government seeks to raise. Every circuit has concluded that the mail fraud statute reaches only schemes aimed at depriving another of money, property, or honest services. *See* pp. 10-11, *infra*. This case should be decided based on the question on which certiorari was granted.

Government likewise did not raise the claim in its brief in *Salvatore* but instead argued that the charges there "described property loss." *See* U.S. Br. in *Salvatore* at 23, 51-55 (5th Cir.) (No. 96-30221).

II. THE MAIL FRAUD STATUTE IS LIMITED TO SCHEMES TO DEPRIVE ANOTHER OF MONEY, PROPERTY, OR THE RIGHT OF HONEST SERVICES.

Even if the Government's new claim is entertained, it should be rejected. The claim is foreclosed by *McNally v. United States*, 483 U.S. 350 (1987), and *Carpenter v. United States*, 484 U.S. 19 (1987). Indeed, just last year, in its brief in *Neder v. United States*, 527 U S. 1 (1999), the Government told this Court that the mail fraud statute is limited to schemes intended to defraud a victim or to obtain money or property from the victim. *See* p. 10, *infra*. There is no justification for revisiting *McNally* and *Carpenter*. Even if there were, the Government's claim is without merit.

A. *McNally* Held, and *Carpenter* Reaffirmed, That the Mail Fraud Statute Is Limited to the Protection of Property Rights.

The Government's contention is contrary to the holding of *McNally*, which was restated and applied in *Carpenter*. In *McNally* the Court analyzed the mail fraud statute, its legislative history, and precedent, and then announced the following holding: "we read § 1341 as limited in scope to *the protection of property rights*. If Congress desires to go further, it must speak more clearly than it has." 483 U.S. at 360 (emphasis added).[3] In *Carpenter* the Court specifically stated: "*We held in McNally* that the mail fraud statute does not reach 'schemes to defraud citizens of their intangible rights to honest and impartial government,' and *that the statute is 'limited in scope to the protection of property rights.*'" 484 U.S. at 25

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[3] *See also id.* at 359 n.8 ("the mail fraud statute, as we have indicated, had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute *must be limited to the Government's interests as property holder*" (emphasis added)), 356 ("the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property"), 356 ("The mail fraud statute clearly protects property rights . . . ."), 357 (1909 amendment "gave further indication that the statute's purpose is protecting property rights").

(quoting *McNally*, 483 U.S. at 355, 360) (citation omitted) (emphasis added).[4] The Court upheld the mail and wire fraud convictions at issue in *Carpenter* only after concluding that the defendants had participated in a scheme aimed at depriving the Wall Street Journal of property. *See Carpenter*, 484 U.S. at 25-28.

In short, *McNally* held, and *Carpenter* reaffirmed, that § 1341 is limited to protecting property rights. The position advanced by the Government here is tantamount to a request that the Court overrule *McNally*.

B. *McNally* Construed the Statute, Not Just a Single Phrase.

The Government asserts that *McNally* was concerned only with the phrase "any scheme or artifice to defraud" (which dates back to the original mail fraud statute) and did not construe the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" (which was added to the statute in 1909 as part of the revision and codification of federal criminal laws). According to the Government, the addition of the second phrase in 1909 extended the statute to conduct not aimed at depriving anyone of money or property. U.S. Br. 10, 11. In *McNally*, however, the Court specifically considered and rejected the argument that the two phrases should be interpreted independently. The Court interpreted the second phrase as merely confirming that the statute proscribes false promises and representations as to the future as well as other frauds involving money or property. Contrary to the Government's contention here, *McNally* establishes that the two phrases do not define independent grounds of liability.

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[4] *See also Carpenter*, 484 U.S. at 25 ("Petitioners assert that . . . they did not obtain any 'money or property' from the Journal, which is a necessary element of the crime under our decision last Term in *McNally* . . . ." (footnote omitted)), 27 ("Sections 1341 and 1343 reach any scheme *to deprive another* of money or property by means of false or fraudulent pretenses, representations, or promises." (emphasis added)).

1. The Government stresses that in *McNally* "The Court observed that '[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently.'" U.S. Br. 14 (quoting 483 U.S. at 358). But in the very next paragraph of the opinion, the Court specifically resolved that "arguable" question against the Government, concluding that the second phrase merely clarifies the first:

> As the Court long ago stated, however, the words "to defraud" commonly refer "to wronging one in his property rights by dishonest methods or schemes," and "usually signify the deprivation of something of value by trick, deceit, chicane or overreaching." *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). The codification of the holding in *Durland* [*v. United States*, 161 U.S. 306 (1896),] in 1909 does not indicate that Congress was departing from this common understanding. *As we see it, adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property.*

McNally, 483 U.S. at 358-59 (footnote omitted) (emphasis added).

Accordingly, when the *McNally* Court thereafter stated the holding of the case, the Court did not limit it to the first phrase but instead applied it to the statute as a whole: "we read *§ 1341* as limited in scope to the protection of property rights." *Id.* at 360 (emphasis added). *See also id.* at 359 n.8 ("*the mail fraud statute*, as we have indicated, had its origin in the desire to protect individual property rights, and any benefit which the Government derives from *the statute* must be limited to the Government's interests as property holder" (emphasis added)).[5]

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[5] Certainly courts and commentators have understood *McNally* to address the statute as a whole, not just the first phrase. *See, e.g., United States v. Runnels*, 877 F.2d 481, 490 (6th Cir. 1989) (en banc) ("in *McNally* the Supreme Court specifically rejected the notion that the con-

The Government's central argument is that the "or" separating the first two phrases of the statute indicates that the phrases should be interpreted as defining independent schemes punishable as mail fraud. *McNally* squarely rejected that argument.

2. An examination of the facts of *McNally* confirms that the decision is not limited to the first phrase. The indictment and jury instructions were based on the second phrase as well as the first. As the Court explained, the mail fraud count "alleged that petitioners had devised a scheme (1) to defraud the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly, and (2) *to obtain, directly and indirectly, money and other things of value by means of false pretenses and the concealment of material facts.*" *Id.* at 353-54 (emphasis added). Similarly, the jury instructions were based on both phrases. *See id.* at 355.

If the Government were correct that the Court intended to hold only that the first phrase of § 1341 requires a deprivation of money or property, the Court surely would have separately addressed the question whether the convictions could stand under the second phrase. The Court did not do so. Instead, the Court simply reversed the convictions because the jury was not required to find a deprivation of money or property.[6]

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cept of 'defrauding' or 'obtaining money by false pretenses,' although phrased in the disjunctive, represented two different types of charges"); Michael R. Dreeben, *Insider Trading and Intangible Rights: The Redefinition of the Mail Fraud Statute*, 26 AM. CRIM. L. REV. 181, 192 (1988) ("the Court concluded that mail fraud must involve a wrong to money or property rights").

[6] *See McNally*, 483 U.S. at 360 ("there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property. It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance. Hunt and Gray received part of the commissions but those commissions were not the Commonwealth's money.").

Citing page 361 of *McNally*, the Government asserts that the Court "declined to address the applicability of the second clause because the jury instructions did not require a finding that the defendants obtained property by fraudulent means." U.S. Br. 13. The Government has mis-

That the Court dealt with the jury instructions on mail fraud *en masse*, rather than separately addressing the first and second phrases, is confirmation that the Court intended its holding to apply to both phrases.

3. Decisions of this Court subsequent to *McNally* also refute this Government's attempt to confine that decision to the first phrase of the statute. *Carpenter* treated *McNally's* holding as applicable to the mail fraud statute, not just the first phrase. *See* 484 U.S. at 25, 27. Similarly, *McNally's* rejection of the notion that the two phrases establish independent bases of liability was an implicit premise of the Court's decision in *Neder*. In *Neder* the Court held that, because the term "defraud" required proof of materiality at common law, and statutory terms with a well-known meaning at common law are presumed to incorporate that meaning, materiality of falsehood is an element of mail fraud. 527 U.S. at 21-25. Had the Court considered it an open question whether the second phrase of the statute creates a separate ground of liability, it would have been necessary for the Court separately to address whether that phrase also requires materiality. The Court did not do so but instead construed the entire mail fraud statute. *Id.* at 25.

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read the Court's opinion. The comment at page 361 addresses only *one* of the alternative means by which, according to the Government's brief in *McNally*, the defendants had schemed to obtain property – *i.e.*, "by means of false representations to [the insurance company] Wombwell." *McNally*, 483 U.S. at 361. In light of the jury instructions, the Court held that the jury had not been required to find that the defendants engaged in a scheme to deprive Wombwell of its property. But the Government also had argued, and the Court agreed, that the defendants obtained insurance commissions through false pretenses and the concealment of material facts from the Commonwealth. *See* U.S. Br. in *McNally* at 18-19; *McNally*, 483 U.S. at 360. If the Court had considered its holding about property rights to be confined to the first phrase of § 1341, the Court would not have reversed the convictions without providing some other explanation for why obtaining the insurance commissions did not violate the statute.

C. There Is No Justification for Revisiting the Question of Statutory Interpretation Decided in *McNally*.

The Government's contention that § 1341 reaches schemes which only seek to obtain property is thus directly contrary to the holding of *McNally*, which was reaffirmed in *Carpenter*. The interpretation adopted in those decisions was correct. *See* Part II.D, *infra*. Moreover, as a well-established statutory interpretation, it should not be revisited.

The Government is asking this Court to overrule *McNally*, to adopt a new interpretation that is contrary to the law in every circuit, *see* pp. 10-11, *infra*, and to apply it to conduct occurring in 1994 and 1995. That result is precluded by the due process prohibition against retroactive application of an unforeseeable construction of a criminal statute. *See*, *e.g.*, *Marks v. United States*, 430 U.S. 188, 195-96 (1977); *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964); *People v. Tompkins*, 186 N.Y. 413, 416, 79 N.E. 326, 327 (1906). "The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d ed. 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures." *Bouie*, 378 U.S. at 354. In 1994 and 1995, it certainly was not the law that § 1341 applied to efforts to obtain property without depriving anyone of property.

Even apart from constitutional limitations, the doctrine of *stare decisis* calls for adherence to *McNally* and *Carpenter*. Where "a pure question of statutory construction" is involved, "the doctrine of *stare decisis* is most compelling." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 205 (1991). "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). The Court declared in *McNally*: "If Congress desires to go further, it must speak more clearly than it has." 483 U.S. at 360. In response, Congress did decide to go further, but only

by extending the statute to schemes aimed at depriving another of the right of honest services. *See* Pet. Br. 14.

D. The Government Has Not Shown That the Mail Fraud Statute Reaches Beyond the Protection of Money, Property, and the Right of Honest Services.

For many reasons, the Government's contention should be rejected even if the Court were willing to re-examine the correctness of *McNally* and *Carpenter*.

1. As recently as last year, the Government advanced an interpretation of the mail fraud statute that is contrary to the interpretation it now asks the Court to embrace. In its brief in *Neder*, the Government argued that the elements of the mail, wire, and bank fraud statutes "limit the scope of the statutes to schemes that the defendant subjectively intends would defraud a victim or would enable the defendant to obtain money or property from the victim." U.S. Br. in *Neder* at 44. *See also id* at 40 (arguing that the "essence" of mail, wire, and bank fraud "is the intent to defraud, and a person thus cannot commit those crimes without at least intending that his fraudulent scheme cause the victim to part with money, property, or some other interest"). The Government offers no explanation for its abrupt change in position.

2. As the Court noted in *McNally*, "the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." 483 U.S. at 356. *See* Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (statement of Rep. Farnsworth) (explaining recodification that included the mail fraud statute as necessary "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country").

3. All the courts of appeals construe the mail fraud statute to require a scheme to deprive another of money, property, or the right of honest services. *See, e.g.*, *United States v. Kenrick*, 221 F.3d 19 (1st Cir. 2000); *United States v. Ochs*, 842 F.2d 515, 521-27 (1st Cir. 1988); *United States v.*

Guadagna, 183 F.3d 122, 129 (2d Cir. 1999); *United States v. Miller*, 997 F.2d 1010, 1016 (2d Cir. 1993); *United States v. Henry*, 29 F.3d 112, 113-16 (3d Cir. 1994); *United States v. Adler*, 186 F.3d 574, 576 (4th Cir. 1999); *United States v. Stouffer*, 986 F.2d 916, 922 (5th Cir. 1993); *United States v. Baldinger*, 838 F.2d 176, 179 (6th Cir. 1988); *United States v. F.J. Vollmer & Co.*, 1 F.3d 1511, 1520 (7th Cir. 1993); *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990); *United States v. Walgren*, 885 F.2d 1417, 1423-24 (9th Cir. 1989); *United States v. Shelton*, 848 F.2d 1485, 1495-96 (10th Cir. 1988); *United States v. Goodrich*, 871 F.2d 1011, 1013 (11th Cir. 1989); *United States v. Perholtz*, 836 F.2d 554, 557-58 (D.C. Cir. 1987); *Semiconductor Energy Lab. Co. v. Samsung Elecs. Co.*, 204 F.3d 1368, 1380 (Fed. Cir. 2000), *petitions for cert. filed*, 69 U.S.L.W. 3110 (July 21 and 25, 2000) (Nos. 00-127, 00-138).

In *United States v. Martinez*, 905 F.2d 709 (3d Cir. 1990), upon which the Government relies, *see* U.S. Br. 12, the Third Circuit only briefly discussed whether § 1341 is limited to schemes to deprive a victim of property. 905 F.2d at 713. The court did not come to any firm conclusion and instead decided the case on the ground that the Commonwealth of Pennsylvania had been deprived of property. *Id.* at 714-15. The Third Circuit subsequently has held that conduct which only seeks to obtain money or property, without depriving anyone of money or property, is not punishable under the mail or wire fraud statutes. In *United States v. Henry*, the court affirmed the dismissal of wire fraud charges because the alleged scheme had not been calculated to cause a deprivation of property. 29 F.3d at 114-16. The court framed the question to be decided as whether the alleged victims of the scheme (certain banks) had been deprived of "a property right." *Id.* at 114. Finding no such deprivation, the court held the indictment deficient – even though it alleged that the participants in the scheme had obtained a substantial sum of money:

> Our determination that the fair opportunity to bid is not a property right of the competing banks seals the fate of this indictment. It is irrelevant that, as the govern-

> ment points out, the scheme allegedly afforded its participants tangible benefits–over $34,000,000 in deposits for Bank A, and favorable loan treatment and campaign contributions to his political allies for Mike. The same was true in *McNally*, but did not save the convictions there.

Id. at 116.

4. Repeating an argument it unsuccessfully made in *McNally*, *see* U.S. Br. in *McNally* at 17, the Government emphasizes that "'[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings.'" U.S. Br. 13 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). But this canon is simply one interpretive guide, and there are many instances besides *McNally* in which the Court has found it inapplicable. *See, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 585-86 (1983); *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 7-8 (1985); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380-81 (1999).[7]

5. It is apparent that the addition of the second phrase, as part of the revision and codification of federal criminal laws in 1909, was not intended to expand the statute to reach schemes not aimed at depriving anyone of money or property; and that, to the contrary, the amendment "gave further indication that the statute's purpose is protecting property rights." *McNally*, 483 U.S. at 357.

In 1897 Congress created a Commission to revise and codify the criminal and penal laws of the United States. Act of June 4, 1897, 30 Stat. 11, 58. The act constituting the Commission mandated that the Commission's report "shall be so made as to indicate any proposed change in the substance of existing law, and shall be accompanied by notes which shall

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[7] That the second phrase does not contain the words "from another," *see* U.S. Br. 11-12, hardly demonstrates that Congress sought to extend the statute to conduct not aimed at obtaining anyone's money or property. To the extent that members of the 1909 Congress focused on the phrase, they would not likely have considered the absence of those two words significant, for fraudulent conduct inevitably involves another person.

briefly and clearly state the reasons for any proposed change." *Id.*

In 1901 the Commission presented a report to the Attorney General. *See Report of the Commission To Revise and Codify the Criminal and Penal Laws of the United States*, S. Doc. No. 57-68, Part 2 (1901). After reciting the foregoing mandate, *id.* at III, the Commission proposed a revision of the mail fraud statute. *Id.* at 63. One proposed change was the addition of the phrase "or for obtaining money or property by means of false and fraudulent pretenses, representations, or promises." *Id.* Consistent with its mandate from Congress, the Commission indicated in the part of its report concerning the mail fraud statute the proposed changes in the substance of existing law. *See id.* at XVII, reproduced in the Addendum, *infra*. No mention was made of what is now the second phrase. Given the Commission's mandate, the Commission clearly did not intend that phrase to effect a "change in the substance of existing law." 30 Stat. at 58. That is particularly so given the use of a gerund rather than an infinitive and the title the Commission chose for the revised statute it proposed: "Use of mails to promote frauds." Report, at XVII, 63.

Congress subsequently considered the Commission's Report and adopted without significant change the Commission's proposed revision of the mail fraud statute.[8] The House and the Senate reports both quote the Commission's mandate to indicate any proposed change in the substance of existing law.[9] In discussing the revision to the mail fraud statute, the reports simply state: "Aside from a transposition of language, all other changes made in this section are indicated by italics and need no further explanation."[10] Given

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[8] Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130. The word "and" after "false" in the Commission's 1901 Report was changed to "or" in the 1909 amendments. The title "Use of mails to promote frauds" was changed to "Using mails to promote frauds."

[9] *See* H. R. Rep. No. 60-2, Part 1, at 1 (1908); S. Rep. No. 60-10, Part 1, at 1 (1908).

[10] H. R. Rep. No. 60-2, Part I, at 22; S. Rep. No. 60-10, Part 1, at 22.

Congress's familiarity with the Commission's mandate to indicate any proposed change in the substance of existing law, it is reasonable to infer that Congress understood the amendments to the mail fraud statute to change existing law only in the respects noted in the Commission's report.[11] That is particularly so given the absence of any comment in the debates in Congress or in any committee report suggesting an intent to expand the statute to reach conduct not aimed at depriving anyone of money or property. *Cf. McBoyle v. United States*, 283 U.S. 25, 26-27 (1931) (holding criminal statute inapplicable to airplanes in part because they were well known when the statute was enacted but "were not mentioned in the reports or in the debates in Congress"). The Government notes that the 1909 revision made "other significant changes in the mail fraud statute." U.S. Br. 15 n.5. But unlike the addition of the second phrase, both of the changes in the statutory text pointed to by the Government were discussed in the Commission's Report. *See* Report, at XVII.

Thus, the background of the 1909 revision fully supports this Court's conclusion in *McNally* that the addition of the second phrase "codified the holding of *Durland* [*v. United States*, 161 U.S. 306 (1896)], which was cited in the Commission's Report." *McNally*, 483 U.S. at 357. The language of the second phrase closely tracks the opinion in *Durland*. As the Court observed in *McNally*, the second phrase "is based on the statement in *Durland* that the statute reaches 'everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.'" 483 U.S. at 358 (quoting *Durland*, 161 U.S. at 313). The phrase "for obtaining money or property" was simply substituted for *Durland*'s "everything designed to defraud," *see McNally*, 483 U.S. at 358, and minor changes were made to the remainder of the sentence from *Durland*. Because the phrase merely codified *Durland*, the Commission did not regard its

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[11] *See also* 42 Cong. Rec. 589 (1908) (remarks of Rep. Sherley) (stating that his "attitude . . . toward this work has been one against the creation of new law," and that "I found that attitude to be held by all the other members of the [Joint] [C]ommittee [on the Revision of the Laws]").

addition as a substantive change to be discussed in the Commission's Report.[12]

For all these reasons, if the Court entertains the Government's first contention, that contention should be rejected.

III. THE STATE OF LOUISIANA WAS NOT DEPRIVED OF PROPERTY.

In advancing its alternative claim that the State of Louisiana was deprived of property, the Government does not point to case law that supports the expansive notion of property adopted by the Court of Appeals. Although various kinds of licensing schemes have been utilized in a broad spectrum of areas for more than a century, *see* Pet. Br. 24-25, the Government likewise does not cite a treatise or even a law review article supporting the view that a governmental entity is deprived of property when it issues a license. This absence of supporting authority is confirmation that the Court of Appeals' decision goes beyond any established concept of property, and is contrary to *Carpenter v. United States*, 484 U.S. 24 (1987), and other decisions recognizing that traditional understandings are the benchmark in determining whether something is property for purposes of the mail fraud statute. *See id.* at 26; cases cited at Pet. Br. 32 & n.32.[13]

In its effort nevertheless to sustain petitioner's conviction and sentence, the Government offers an array of differing contentions and analogies. First, it asserts that the State "has

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[12] In its brief in *McNally*, the Government itself recognized that the 1909 amendment "codified" *Durland*. *See* U.S. Br. in *McNally* at 25. It argues exactly the opposite here. *See* U.S. Br. 17.

[13] Both the Court of Appeals' decision in *United States v. Salvatore*, 110 F.3d 1131 (5th Cir. 1997), and the Third Circuit's decision in *Martinez* relied upon Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964), but petitioner demonstrated in his opening brief that the courts' reliance on that article was misplaced. Pet. Br. 31-33. The Government obviously does not disagree, as it makes no mention of the Reich article. Nor does the Government, in the part of its brief contending that the State was deprived of property, make any mention of the Third Circuit's reasoning in *Martinez*.

a property interest in a video poker license even before the license has been issued," U.S. Br. 32, because the State expects to collect a fee before issuance and a percentage of net revenues after issuance. According to the Government, the State "is effectively 'selling' the license to the applicant," *id.* 33, and the State's position is similar to that of a patent holder. *Id.* 33-34. Second, the State purportedly had "a property interest in the license once it had been issued," *id.* 35, because the State is "essentially in business with the licensee," *id.*, and the State "protects its interest in the business" by "extensive regulation and monitoring," *id.*, and by "retain[ing] control over whether, and in what circumstances, the license could be retained, revoked, transferred, or renewed." *Id.* 37. Third, the Government suggests that the license "may also be viewed as a franchise." *Id.*

Although the Government jumps nimbly from one theory to another, its effective-sale, patent, essentially-in-business-with-the-licensee, and franchise theories are all seriously flawed. None suffices to show that the scheme charged was one to deprive the State of property.

A. The State Has No Property Interest in Video Poker Licenses Before They Are Issued.

1. The Government contends that the State "expects" to collect revenues – in the form of application fees and a percentage of future net revenues – from a licensee, "projects its anticipated revenue" based on that expectation, and therefore somehow has a property interest in a video poker license before issuance. *Id.* 32-33. Yet the Government never identifies exactly what interest of the State purportedly constitutes property. It says that a "property interest" exists, but it never describes what that interest is. Certainly a governmental entity's expectations and projections of revenue do not themselves create property rights, and the Government cites no authority to the contrary. Notably, the Government does not embrace the Fifth Circuit's description of the purported right, namely, "Louisiana's right to choose the persons to whom it issues video poker licenses." *Salvatore*, 110 F.3d at 1140. The Government does not dispute that that is an aspect of the State's regulatory powers rather than a property right. *See*

Pet. Br. 16. But the Government is unable to offer any substitute description of any State interest in an unissued license that constitutes a property right.

Instead, the Government argues that the State, when it issues a license, "is effectively 'selling' the license to the applicant" in return for the application fee and the subsequent percentage of revenues. U.S. Br. 33. The Government goes on to assert that it would be "curious" to conclude that the State is not giving up property when it issues a license, given that the license applicant is giving up property (in the form of money) and is receiving property (the license). *Id.* It is not at all clear that an issued video poker license is property in the hands of the licensee. *See* Pet. Br. 29 & n.29; note 24, *infra*; *Guillot v. La. Gaming Control Bd.*, 761 So. 2d 561, 563 (La. Ct. App. 1999) ("A gaming permit [allowing an employee to work in a casino] is not a right of property, citizenship or otherwise."). But even assuming that an issued license is property of the licensee, it does not follow that the State is deprived of any of its property when it issues the license.

Under the Government's effective-sale theory, a State would part with property whenever it issues, upon payment of *any* fee, a license that is property in the licensee's hands. Yet the courts of appeals have overwhelmingly held, in cases involving a wide variety of licenses, that a State does not part with property in issuing a license, and the Government does not challenge the correctness of those decisions. *See* U.S. Br. 39-40. The Government's effective-sale theory does not afford any principled basis for treating video poker licenses in Louisiana differently from any license for which a fee is paid and which constitutes property in the hands of the licensee.

Moreover, this Court has rejected an effort – similar to the Government's effective-sale argument here – to characterize a sovereign act of the government as a purchase. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 594 (1997) (rejecting "the notion that whenever a State provides a discriminatory tax abatement it is 'purchasing' some service in its proprietary capacity"). As in *Camps Newfound/Owatonna, Inc.*, in which this Court stressed that the tax exemption at issue "sweeps to cover broad swathes of the

nonprofit sector," *id.* at 594, the breadth of Louisiana's video poker licensing scheme – which embraces thousands of locations, *see* p. 26, *infra* – indicates that video poker licensing is "action taken in the State's sovereign capacity rather than a proprietary decision." 520 U.S. at 594. As a general matter, a governmental body's issuance of a license or permit is a regulatory and not a proprietary act,[14] and here the regulatory nature of video poker licensing has been recognized by the Louisiana judiciary, *see* Pet. Br. 15; the Attorney General of Louisiana, *see id.* 16; the Louisiana legislature;[15] and the Louisiana Department of Public Safety and Corrections. *See* La. Admin. Code, tit. 55, § 2405(A)(7) (1992).[16]

2. Contrary to the Government's suggestion, U.S. Br. 33-34, the case law recognizing that a holder of an *issued* patent has a property right in the patent does not indicate that the State has a property right in an *unissued* video poker license. The Government argues that the State's power to prohibit

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[14] *See, e.g., United States v. Schwartz*, 924 F.2d 410, 417 (2d Cir. 1991) (export licenses for ammunition); *Yellow Cab Co. v. City of Chicago*, 186 F.2d 946, 948-49 (7th Cir. 1951) (taxicab licenses); *Sahuque Realty Co. v. Employers Commercial Union Ins. Co. of Am.*, 327 So. 2d 563, 568 (La. App. 1976) (building permit); *see also Goodwill Adver. Co. v. State Liquor Auth.*, 244 N.Y.S.2d 322, 329 (N.Y. Sup. Ct. 1962) (Lawrence Cooke, J.) (state's revocation of licenses to sell beer did not involve a proprietary right of the state), *aff'd on the trial court op.*, 244 N.Y.S.2d 640 (N.Y. App. Div. 1963).

[15] *See* La. Rev. Stat. Ann. § 33:4862.6(A)(1) (West Supp. 1996) (current version at La. Rev. Stat. Ann. § 27:306(A)(1)) ("The state of Louisiana has a legitimate interest in providing strict regulation of all persons, practices, associations, and activities related to the operation of licensed establishments licensed to offer video draw poker devices . . . .").

[16] That the State is not acting in a proprietary capacity in issuing video poker licenses is confirmed by the fact that the licensing scheme was established by a legislative mandate. *See Ass'n of Mexican-American Educators v. California*, 195 F.3d 465, 484 (9th Cir. 1999) (fact that teachers' examination requirement "was mandated by the Legislature (rather than by an administrator responsible for managing the positions at issue)" constituted "evidence that the State is acting in its sovereign capacity rather than its proprietary capacity").

others from running video poker operations, and to run such operations itself, is similar to a patent holder's power to prevent others from using his invention. *Id.* 34. The Government's argument disregards the critical difference as to the source of those powers: Whereas a patent holder can prohibit others from using his invention because he owns the patent, the State has the power to regulate gambling, not because of any property right of the State, but because of the State's police power. *See Polk v. Edwards*, 626 So. 2d 1128, 1137 (La. 1993) ("Louisiana courts have consistently recognized that the legislature's authority to regulate gambling constitutes a legitimate exercise of police power").

The Government also compares the State's financial exploitation of its authority over video poker through licensing to a patent holder's financial exploitation of his patent through licensing, and then concludes: "In both cases, the power to license others to participate in a particular economic activity, which they could not engage in absent the license, *furthers economic interests that qualify as property*." U.S. Br. 34-35 (emphasis added). The Government's argument is specious. It is not the patent holder's ability financially to exploit his patent that makes the patent property. *See College Sav. Bank v. Fl. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) ("business in the sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense" (emphasis in original)). A patent is property whether or not anyone will pay for the right to use the invention it covers. Accordingly, that the State can obtain revenue through video poker licenses does not at all indicate that an unissued video poker license is property.

The most pertinent decision involving a patent is not mentioned in the Government's brief. It is the Federal Circuit's decision holding that the Patent and Trademark Office is not deprived of property when it issues a patent.[17]

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[17] *See Semiconductor Energy Lab. Co. v. Samsung Elecs. Co.*, 204 F.3d 1368, 1380 (Fed. Cir. 2000), *petitions for cert. filed*, 69 U.S.L.W. 3110 (July 21 and 25, 2000) (Nos. 00-127, 00-138).

B. The State Has No Property Interest in the Licenses After They Are Issued.

The Government's alternative contention that the State had a property right in Truck Stop Gaming's license once it had been issued, U.S. Br. 35, raises an issue (i) that is not fairly included in the question on which certiorari was granted, which concerns whether the State is deprived of property when it issues a license, *see* page 1, *supra*; (ii) that was not raised in the Government's opposition to certiorari; and (iii) that was not raised or decided below. Under the authorities set forth in Part I, *supra*, the Government's new claim should not be addressed.

In any event, the Government's claim is without merit. To begin with, it does not fit the facts. The mail fraud charges were based on the license applications and accompanying affidavits, not any alleged misrepresentations during the one-year term of a license for the purpose of keeping that license for the rest of the year. *See* U.S. Br. 2a.

The Government's claim would fail even if it did fit the facts. According to the Government, the State has a property right in an issued license because the State is "essentially in business with the licensee," *id.* 35, and the State "protects its interest in the business through extensive regulation and monitoring," *id.* 35, and through retention of "control over whether, and in what circumstances, the license could be retained, revoked, transferred, or renewed." *Id.* 37. That argument is based on an incorrect premise and on features of Louisiana's video poker licensing scheme that most licensing schemes possess. It also confuses an interest in receiving revenue with a property right.

1. The Government finds a State property right in issued licenses because "The State prohibits the transfer of a video poker license to another person *except in limited circumstances with the approval of the State.*" U.S. Br. 31 (emphasis added); *see also id.* 32 ("The State controls . . . whether the license may be transferred . . . ."), 37 (after issuance of Truck Stop Gaming's license, "the State . . . retained control over whether, and in what circumstances, the license could be . . . transferred"). The Government relies upon the alternative

holding in *United States v. Bucuvalas*, 970 F.2d 937 (1st Cir. 1992), that the defendants there had deprived Massachusetts of a property right by transferring alcoholic beverage and entertainment licenses to straw owners. *Id.* at 939, 945. The Government's arguments fails for two independent reasons.

First, contrary to the government's assertion, the Louisiana video poker statute does not give the State "control" over the transfer of video poker licenses, U.S. Br. 32, 37, or provide for the transfer of licenses "in limited circumstances with the approval of the State." *Id.* 31. Rather, the statute flatly prohibits the transfer of a video poker license: "Any license issued pursuant to the provisions of this Part shall be personal to the licensee to whom it was issued and shall not be transferable." La. Rev. Stat. Ann. § 33:4862.11(G) (West Supp. 1996) (current version at La. Rev. Stat. Ann. § 27:311(G)). Indeed, the Government acknowledged in the District Court that video poker licenses are not transferable. R. 618. Because the statute requires persons holding more than a five percent ownership interest in a licensed entity to meet suitability requirements, *see* La. Rev. Stat. Ann. § 33:4862.11(D) (West Supp. 1996) (current version at La. Rev. Stat. Ann. § 27:311(D)), the transfer of such an interest allows the State to determine the suitability of the new owner pursuant to the State's regulatory powers. But because video poker licenses themselves are not transferable, the Government's new theory that the State's control over license transfers gives the State a property right is fallacious.

The Government cites La. Rev. Stat. Ann. § 27:306(D)(2) (formerly La. Rev. Stat. Ann. § 33:4862.6(D)(2) (West Supp. 1996)) to support its transfer argument. U.S. Br. 31, 36 n.19. That provision, however, does not permit the transfer of a license to another person. It applies when "the lease of a truck stop facility, which is a licensed establishment for the operation of video draw poker devices, expires or is terminated without legal cause by the lessor." La. Rev. Stat. Ann. § 27:306(D)(1). In that situation, § 27:306(D)(2)(b) merely permits the former lessee/licensee to "transfer the existing license to any other new or existing truck stop facility which meets all of the qualifying requirements contained in this

Chapter," without being "required to wait before making application and commencing video draw poker operation at a new or existing facility." Section 27:306(D)(2)(b) contemplates, not the transfer of a license to another person, but the former lessee/licensee's continued use of its own license at another truck stop without waiting to apply for a new license. No alienation of the license is involved.[18] Thus, whereas the licenses in *Bucuvalas* were transferable to third parties with the approval of the licensing authorities,[19] the video poker licenses here were not transferable.

Second, the jury instructions did not require the jury to find (nor did the evidence show) that Truck Stop Gaming's licenses had been transferred. *See* U.S. Br. 5a-7a. Even if video poker licenses in Louisiana were transferable (which they are not), the absence of an instruction requiring such a finding would make the Government's transfer theory an invalid basis for sustaining petitioner's conviction. *See McNally v. United States*, 483 U.S. 350, 360 (1987) (reversing conviction because "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property"); *see also Griffin v. United States*, 502 U.S. 46, 58-60 (1991); *Pierce v. United States*, 314 U.S. 306, 309-10 (1941).[20]

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[18] Similarly, La. Rev. Stat. Ann. § 27:306(E), cited at U.S. Br. 36 n.19, merely provides that when a licensed establishment requiring an alcoholic and beverage license as a condition of receiving a video poker license is sold, the video gaming devices can continue to be operated during the pendency of the purchaser's applications for a new alcoholic and beverage license and video poker license. No transfer of the seller's license is permitted.

[19] *See* Mass. Gen Laws Ann. ch. 138, § 23 (West 1991) ("Any license under this chapter held by an individual, partnership or corporation may be transferred to any individual, partnership or corporation qualified to receive such a license in the first instance, if, in the opinion of the licensing authorities, such a transfer is in the public interest.").

[20] Although the Government dwells on the fact that Truck Stop Gaming's licenses were renewed, U.S. Br. 35, 37, under the Louisiana licensing scheme each video poker license automatically expires at midnight on June 30 of each year. *See* La. Admin. Code tit. 55, § 2405(A)(6) (1992).

2. Although the Government also notes that the State "retained control over whether, and in what circumstances, the license could be retained, revoked, . . . or renewed," U.S. Br. 37, it is typical for licensing authorities to have the power to suspend a license, revoke a license, and deny the renewal of a license. Such powers are inherent in most licensing schemes and in no way indicate that a State parts with property in issuing or renewing a license.

3. All that remains of the Government's contention as to issued licenses is its characterization of the State as "essentially in business with the licensee," and its emphasis on the "extensive regulation and monitoring of the licensed activity." U.S. Br. 35. Neither of those points suggests that the State holds a property right in each of the thousands of video poker licenses it has issued.

As to the former, a governmental entity's interest in receiving revenue from a regulated activity has never been regarded as a property right – as evidenced by the Government's failure to cite a single supporting authority. The Government's equation of "an ongoing economic stake" with a property right, U.S. Br. 35, would produce absurd results. Most States levy a sales tax based on a percentage of gross sales. For many lines of business in which sales tax is collected, *e.g.*, restaurants and bars, a state license is required. Under the Government's reasoning, the State would hold a property right in each restaurant license and liquor license. That is plainly not the law. Even from the licensee's perspective, the licensed activity of running video poker operations is not itself property. *See College Sav. Bank*, 527 U.S. at 675 ("business in the sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense") (emphasis in original). *A fortiori*, the activity of running video poker operations is not the State's property.

As to the State's point about "extensive regulation and monitoring," U.S. Br. 35, that is a common feature of licensing schemes. That some licensing schemes call for close regu-

lation and monitoring has never been regarded as giving the licensing authorities a property right in issued licenses.[21]

C. Video Poker Licenses Are Not Comparable to Cable Television Franchises or Other Government Franchises.

The Government's alternative suggestion that a video poker license "may also be viewed as a franchise," U.S. Br. 37, similarly fails to show that the State was deprived of property.

1. A video poker license in Louisiana has the characteristics of a license and not a franchise. In general, a license is a mere privilege and except in rare instances is revocable.[22] In contrast, the grant of franchise, when accepted and acted upon, creates a contract and imposes binding obligations on both the grantor and the grantee.[23]

A video poker license is a privilege and is revocable. The Louisiana legislature has declared that a video poker license is "a pure and absolute privilege, the awarding, denial, or withdrawal of which is solely within the discretion of the division and, except as provided in this Part, without recourse at law." La. Rev. Stat. Ann. § 33:4862.1(D) (West Supp. 1996) (current version at La. Rev. Stat. Ann. § 27:301(D)). There is nothing to suggest that a video poker license creates a con-

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[21] *Cf. United States v. Kristofik*, 847 F.2d 1295, 1296-97 (7th Cir. 1988) (holding that misapplication of proceeds of loan from SBA was not conversion of government property; "As a matter of basic principles, loan proceeds do not remain the property of the lender. . . . Although the level of oversight by the SBA in the transaction before us is perhaps unusually detailed and pervasive, the degree of oversight does not change the fundamental nature of the transaction or create a governmental property interest in the loan proceeds." (citation omitted)).

[22] *See, e.g., Dunmar Inv. Co. v. N. Natural Gas Co.*, 185 Neb. 400, 403-04, 176 N.W.2d 4, 6-7 (1970); *White Top Cab Co. v. City of Houston*, 440 S.W.2d 732, 734-35 (Tex. Civ. App 1969, no writ); *Shaw v. City of Asheville*, 269 N.C. 90, 97, 152 S.E.2d 139, 145 (1967).

[23] *See, e.g., United States v. Slay*, 717 F. Supp. 689, 693 (E.D. Mo. 1989); *Dunmar Inv. Co.*, 185 Neb. at 403, 176 N.W.2d at 6.

tract or that it imposes any obligations on the State. It is therefore properly categorized as a license and not a franchise.[24]

2. More importantly, the Government's franchise cases do not include a single decision holding that a governmental entity parts with property upon issuing something – regardless of what label is applied to it – that resembles a video poker license in Louisiana. None of the decisions of this Court cited by the Government suggest that a franchising authority relinquishes property when it grants a franchise. And the divided decision in *Borre v. United States*, 940 F.2d 215 (7th Cir. 1991), involved a franchise different in critical respects from the license here.

Borre held that a scheme "to obtain the Village of Fox Lake cable television franchise contract," *id.* at 219 (quoting indictment), was a scheme to defraud the Village of property. *Id.* at 219-22. If it were necessary to decide the question, there would be good reason to conclude that Judge Easterbrook, who dissented on this issue, *see id.* at 224-26, was correct and that Judge Wood and Senior District Judge Grant were incorrect. As noted in *United States v. Slay*, 717 F. Supp. 689 (E.D. Mo. 1989), which held that an alleged scheme to obtain a cable television franchise was not one to defraud the city awarding the franchise of property, it is not apparent "how mere contemplation of an ongoing contractual relationship rises to a property right" of which the franchising authority is deprived when it grants the franchise. *Id.* at 693.[25] But even accepting *Borre*, the decision is of no force

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[24] Stressing the broad power of government to suppress gambling, this Court has held that even a written agreement whereby a citizen was to acquire and operate a municipality's lottery was a "gratuity and license," which the State could revoke under its police power. *See Douglas v. Kentucky*, 168 U.S. 488, 502 (1897).

[25] In addition to citing *Borre*, the Government relies upon dicta in *United States v. Italiano*, 894 F.2d 1280, 1285 n.6 (11th Cir. 1990). U.S. Br. 38. In that case, however, the defendant did not dispute that the County of Hillsborough parted with property in granting a cable television franchise. *See* 894 F.2d at 1286.

here because video poker licenses in Louisiana are not similar to cable television franchises.

First, traditionally a cable television franchise effectively has been a monopoly.[26] In *Borre*, for example, the Village of Fox Lake apparently awarded only a single cable television franchise contract. *See* 940 F.2d at 219; *see also id.* at 225 (Easterbrook, J., concurring in part and dissenting in part) ("Franchises usually are exclusive, while licenses are not."). In contrast, the State of Louisiana has issued video poker licenses for thousands of locations. *See Louisiana Legislative Fiscal Office, State Gaming Revenue–Sources and Uses* 1 (Dec. 20, 1999). At each licensed truck stop no more than 50 machines are permitted. *See* La. Rev. Stat. Ann. § 33:4861.6(A)(4)(a) (West Supp. 1996) (current version at La. Rev. Stat. Ann. § 27:306(A)(4)(a)); La. Admin. Code tit. 55, § 2415(A)(1)(e)(i) (1992). Obviously, when only one or a very limited number of franchises is to be granted, upon granting a franchise the franchising authority's ability to award a franchise to someone else has been eliminated or restricted. Whether or not that result can be considered a deprivation of property, the State of Louisiana suffers no similar loss in issuing a video poker license, for the State remains free to issue licenses to an unlimited number of additional applicants.

Second, unlike video poker devices, "cables must be laid in public rights-of-way and easements." *Time Warner Entm't Co.*, 93 F.3d at 962. For that reason, the *Borre* court viewed "the affirmative creation and use of easements and rights of way" with respect to public property as "part and parcel of the cable television franchise." *Borre*, 940 F.2d at 221. When a municipality grants an easement or right-of-way, it plainly parts with property. In contrast, the issuance of a video poker license is not accompanied by the creation of any

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[26] *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460, 1460 (1992) ("most cable television subscribers have no opportunity to select between competing cable systems"); *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 965-66 (D.C. Cir. 1996).

easement, right-of-way, or other property right that entails the relinquishment of property by the State.

D. The Limited Scope of Congress's Response to *McNally* Supports Reversal.

The Government does not dispute that, when Congress restored only a single intangible right to the mail and wire fraud statutes in 1988, Congress knew that *McNally* had been interpreted by lower courts to require setting aside convictions based on alleged deception in obtaining licenses. *See* Pet. Br. 39-40. The Government nevertheless dismisses the intent of the 1988 Congress as "irrelevant to any issue in this case." U.S. Br. 42. This Court has not taken so limited a view of the pertinence of a subsequent amendment. Where it has been shown that Congress was aware of an authoritative interpretation of the statute being amended, but Congress chose not to override that interpretation and instead amended the statute only in other respects, this Court has inferred congressional approval of the interpretation. *See, e.g., CFTC v. Schor*, 478 U.S. 833, 845-46 (1986) (where federal agency issued regulations interpreting statute, and Congress later amended statute but did not overrule agency's interpretation, Congress's inaction was "persuasive evidence that the [agency's] interpretation is the one intended by Congress" (internal quotation marks omitted)); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 781-83 (1985) (where Congress was aware of authoritative case interpreting statute, and amended statute to change the rule established by the case in one respect, the appropriate inference was that Congress accepted the rule in all other respects). A similar inference is warranted here.

* * * *

Under any traditional notion of property, the State of Louisiana no more parts with property when it issues a video poker license than a governmental entity parts with property when it issues a license to export firearms, a school bus operator's permit, a bingo permit, a taxicab driver's license, a city poker license, or any of the other licenses and permits the issuance of which has been held not to constitute a deprivation of property. *See* cases cited at Pet. Br. 19-22. The proposition that the Government urges this Court to embrace

– that a mail fraud charge can be brought whenever the State "retains a substantial economic stake in the licensed activity" (U.S. Br. 40) – bears no relationship to established concepts of property. If the Government's proposition were accepted, courts would have an impossible line-drawing problem. *Cf. United States v. Bailey*, 516 U.S. 137, 149 (1995) (rejecting proposed construction of statute in part because it would create such a problem). How much is "substantial"? What qualifies as an "economic stake"? Are doctors' licenses and nurses' licenses covered because of the public spending on health care? Are teachers' licenses covered because of public spending on education? Are hotel licenses covered in cities where room taxes are high? There would be no principled basis for answering such questions, because the Government's approach is not tethered to any accepted understanding of property.

The Government's failure to show a traditional usage of the term property that encompasses the issuance of licenses in general, or video poker licenses in particular, confirms that the decision below should be reversed. A federal criminal prosecution in which a citizen's liberty is at stake is not an appropriate vehicle for pursuing a novel theory of property.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in petitioner's opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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ADDENDUM

ADDENDUM

The *Report of the Commission To Revise and Codify the Criminal and Penal Laws of the United States*, S. Doc. No. 57-68, Part 2 (1901), states in pertinent part:

> Section 190, "Use of mails to promote frauds:" Section 5480. Revised Statutes, as amended by the act of March 2, 1889, contains the words "to be effected by either opening, or intending to open, correspondence or communication with any person, whether resident within or outside the United States, or by inciting such other person or any person to open communication with the person so devising or intending." It is obvious that these words are not necessary to establish the criminality of the act sought to be denounced or the jurisdiction of the United States over the same, and it further appears from the decision in United States v. Smith (45 Fed. Rep., 561) that they add an element to the proof necessary for conviction. They are accordingly omitted in the revision here submitted. The section is further amended by adding the words "or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed." The following words are omitted: "The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months, but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the Post-Office Establishment enters as an instrument into such fraudulent scheme and device."

Id. at XVII.

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In The

Supreme Court of the United States

CARL W. CLEVELAND,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Amicus curiae will address the following question:

Whether, prior to its issuance, a standard business license – one without a profit-sharing arrangement between the government and the licensee – is the government's property?

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INTEREST OF AMICUS CURIAE

Amicus curiae, the Chamber of Commerce of the United States of America ("the Chamber"), is the world's largest business federation.[1] The Chamber has a substantial membership in each of the 50 States, and through its federation of members represents more than 3,000,000 businesses and professional organizations of every size and in every sector of the economy. More than 95% of the Chamber's members are small businesses with 100 or fewer employees, and virtually all of the nation's largest companies are also members of the Chamber. The Chamber thus serves as a principal voice of American business.

Among its activities, the Chamber represents the interests of its members in matters that are before the various branches of government, including the judiciary. The Chamber has thus participated as *amicus curiae* in numerous cases before this Court, including cases such as *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997), that raised questions addressing government regulation or government remedies for alleged fraud.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus*, its members or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and their consent letters have been filed with the Clerk of the Court.

In this case, the United States Court of Appeals for the Fifth Circuit upheld convictions for, among other things, federal mail fraud. The convictions arose out of alleged misrepresentations by Petitioner and others in an application for (and renewals of) a Louisiana state video poker machine operator's license. Cert. Pet. at 2-7; Opp. at 2-5. The Chamber takes no position on the merits of this specific case. However, given the central role that standard business licenses play in the ongoing commercial activities of its members, and the breathtaking expansion of criminal and civil liability that would result from an overly broad decision here, the Chamber is vitally interested in assisting the Court to reach an informed and appropriate resolution of the question addressed in this brief.

INTRODUCTION

The Chamber's members and their employees together apply for hundreds of thousands of local, state, and federal licenses and permits every year. These standard business licenses, without the benefit of which the Chamber's members cannot lawfully carry on many of their commercial activities, pertain to matters as varied as commodity-specific sales and service permits (*e.g.*, selling or serving food), vehicle operator's licenses, construction or other realty development permits, and professional licenses for fields such as accounting, architecture, engineering, insurance brokerage, investment advice, law, medicine, plumbing, securities brokerage, and taxi driving, among others. See, *e.g.*, D.C. Code Ann., tit. 47, ch. 28

(1997 & Supp. 2000) (establishing comprehensive "General License Law" for the District of Columbia). It is thus no exaggeration to say that the standard business license – of which the foregoing are but a few examples – touches virtually every aspect of contemporary American commercial life. Such standard business licenses typically have application fees that are set roughly to approximate the cost of administering the licensing regime, and such licenses usually do not initiate an ongoing profit-sharing relationship with the licensing authority. At least in the lower federal courts, the Government has consistently argued – with only limited success – for an interpretation of what constitutes government property that would reach unissued standard business licenses. See, *e.g.*, *United States* v. *Martinez*, 905 F.2d 709 (3rd Cir. 1990) (unissued medical license held to be government property).[2]

The federal mail fraud conviction at issue in this case stems from Petitioner's application for a Louisiana video poker machine operator's license, as well as renewals of that license. Cert. Pet. at 2-7; Opp. at 2-5. Louisiana's state video poker machine operator's licensing system has some features that the Government argued in its Certiorari Opposition distinguish video poker licenses from

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[2] The Government has made the same argument in other cases without success. *See, e.g., United States* v. *Paccione*, 949 F.2d 1183 (2d Cir. 1991) (waste transporter permit); *Toulabi* v. *United States*, 875 F.2d 122 (7th Cir. 1989) (taxi driver's license); *United States* v. *Granberry*, 908 F.2d 278 (8th Cir. 1990) (school bus operator's license); *United States* v. *Kato*, 878 F.2d 267 (9th Cir. 1989) (pilot's license); *United States* v. *Shotts*, 145 F.3d 1289 (11th Cir. 1998) (bail bond license).

the many standard licenses for which businesses and professionals routinely apply. Specifically, "the [Louisiana] Video Poker Act requires the licensees to pay a significant, up-front fee for their licenses and also to deposit 22.5% of their net revenues into the state treasury as a franchise fee." *United States* v. *Salvatore*, 110 F.3d 1131, 1141-42 (5th Cir. 1997) (affirming mail fraud convictions predicated on misrepresentations made to obtain Louisiana video poker operator's license); Opp. at 7-8. The Fifth Circuit has twice held – in the case at bar, and in its earlier decision in *Salvatore* – that an unissued video poker operator's license in the hands of the State is property for purposes of the federal mail fraud statute.

The narrow question before this Court is whether an as-yet unissued Louisiana state video poker machine operator's license constitutes the property of the State of Louisiana for purposes of the federal mail fraud statute, 18 U.S.C. § 1341 (1994). As was stated above, the Chamber takes no view on the merits of this specific question. The Chamber does urge, however, that the Court make clear that an unissued standard business license is *not* the issuing authority's property under the federal mail fraud statute. Alternatively, the Court should make clear that this case does not present – and therefore that the Court does not address – the more general question whether an unissued standard business license constitutes property for purposes of the federal mail fraud statute.

SUMMARY OF ARGUMENT

A standard business license is not property when it has not yet been issued by a licensing authority. When government – be it local, state, or federal – issues a license pursuant to an established administrative regime, it exercises the power to regulate, not the powers of a property owner. The regulatory nature of standard licensing regimes is plain, both as a matter of simple logic and under this Court's case law upholding a variety of state law licensing regimes as valid exercises of the States' respective police powers.

It is equally clear that, if an unissued standard business license were held to be an issuing authority's property for federal mail fraud purposes, a number of profoundly troubling results would follow. For example, this conclusion would seem to require fundamental reconsideration of this Court's regulatory takings jurisprudence. This is so because an issuing authority should be able set the price for an as-yet unissued realty development permit – which, under this hypothesis, is assumed to be the issuing authority's property – as high (or as low) as it likes, including requiring the surrender of a public easement across a private party's real estate. In addition, the conclusion that an unissued license is government property would spark an explosion of criminal and *civil* liability under federal and state RICO and *qui tam* statutes, at the same time upsetting whatever administrative enforcement mechanism the pertinent legislature may have crafted to respond to potentially falsified license applications. This Court should not lightly conclude that Congress, by criminalizing mail fraud, intended to undermine regulatory takings law or expand

powerful judicial remedies in derogation of license-specific administrative remedies.

ARGUMENT

The federal mail fraud statute is "limited in scope to the protection of property rights." *McNally* v. *United States*, 483 U.S. 350, 360 (1987).[3] To sustain a conviction for federal mail fraud, then, the Government must prove that the defendant defrauded another of something that qualifies as "property" under the statute. See, *e.g.*, *Carpenter* v. *United States*, 484 U.S. 19, 26 (1987) (upholding federal mail and wire fraud convictions where "[t]he Journal had a property right in keeping confidential and making exclusive use, prior to publication, of the schedule and contents of the 'Heard' column"). Indeed, as the Court observed in *McNally*, the mail fraud statute "had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute must be limited to the Government's interests *as property holder*." *McNally*, 483 U.S. at 359 n.8 (emphasis added). Because a standard business license is

[3] The federal mail fraud statute provides, in relevant part, that "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 1341 (1994).

not the issuing authority's property before an applicant obtains it, a falsehood submitted to that licensing authority through the mails is not mail fraud.

I. AN UNISSUED STANDARD BUSINESS LICENSE IS NOT GOVERNMENT PROPERTY.

Local, state, and federal authorities have established myriad licensing and permitting regimes. These licensing and permitting regimes touch virtually every aspect of contemporary American commercial life, from the licensing of the professions (such as law and medicine) to setting conditions on the marketing of basic goods and services (such as selling and serving food). In order to obtain one of these standard business licenses, an applicant typically pays a fee that roughly approximates the proportionate cost of the regulatory program, and provides information demonstrating that he or she (or it) satisfies the government's criteria for obtaining the license.

For example, Chapter 28 of Title 47 of the District of Columbia Code sets forth a comprehensive "General License Law" for businesses operating in the District of Columbia. See D.C. Code Ann., tit. 47, ch. 28 (1997 & Supp. 2000). Under this General License Law, "[n]o person shall engage in or carry on any business in the District of Columbia without having first obtained a master business license and any necessary endorsements," which vary by the specific business at issue.[4] D.C. Code

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[4] "Business" is defined broadly under this scheme as "any trade, profession, or activity which provides, or holds itself out

Ann. § 47-2851.2 (Supp. 2000). The licensing system is administered by a Business License Center within the D.C. Department of Consumer & Regulatory Affairs. See D.C. Code Ann. §§ 47-2851.5, -2851.7 (Supp. 2000). The Business License Center "collect[s] a fee of $25 for each master business license it issues, plus $5 for each endorsement added to the master business license." D.C. Code Ann. § 47-2851.8(a)(1) (Supp. 2000). This fee is "deposited in the Master License Fund," D.C. Code Ann. § 47-2851.8(a)(2) (Supp. 2000), which Fund pays "[t]he entire cost of the master business licensing system," D.C. Code Ann. § 47-2851.13(b) (Supp. 2000).[5]

The licensing requirements vary according to the particular business at issue. "An applicant for licensure as a certified public accountant," for example, must "establish to the satisfaction of the Board of Accountancy that," among other things, she "[i]s of good moral character" and "[h]as passed a written examination in accounting and auditing and such related subjects as the Board shall

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to provide, goods or services to the general public or to any portion of the general public, for hire or compensation, and which pays, or is subject to the payment of, taxes on earnings, or fees in lieu of taxes, to the District of Columbia, or which qualifies for tax-exempt status under District law." D.C. Code Ann. § 47-2851.1(1)(A) (Supp. 2000). Moreover, the general requirement that all District businesses be licensed has only two narrow exceptions, one for businesses that are affiliated with a District-licensed business but maintain no business address in the District, and the other for specific businesses "whose annual gross receipts are $2,000 or less in any calendar year." D.C. Code Ann. § 47-2851.2(a)(1) & (2) (Supp. 2000).

[5] Renewal fees are treated in like manner. *See* D.C. Code Ann. §§ 47-2851.8(b), -2851.13(b) (Supp. 2000).

determine to be appropriate."[6] D.C. Code Ann. § 47-2853.42 (Supp. 2000). Importantly, all the District's licensing boards are expressly empowered to discipline a licensee who "[k]nowingly provides false or misleading information on or in support of an application or renewal application," as well as one who "[f]raudulently or deceptively obtains, or attempts to obtain, a license or certificate, or to register, for another person." D.C. Code Ann. § 47-2853.17(a)(1) & (2) (Supp. 2000). Possible penalties include revocation of the license, a "civil fine not to exceed $5,000 for each violation," and prosecution for criminal violations.[7] D.C. Code Ann. § 47-2853.17(c)(2) & (5), (d) (Supp. 2000).

As even this brief foray into District of Columbia business licensing makes clear, conducting a business in many localities entails applying for (and, from time to time, renewing) a standard business license of one kind or another. Under the Government's construction of the mail fraud statute, making a false statement on an application for such a license that is sent through the mails is

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[6] The Board of Accountancy is itself established by the General License Law. *See* D.C. Code Ann. § 47-2853.6(b) (Supp. 2000).

[7] Under the District's general criminal code, it is unlawful to "willfully make[ ] a false statement that is in fact material, in writing, directly or indirectly, to any instrumentality of the District of Columbia government, under circumstances in which the statement could reasonably be expected to be relied upon as true," so long as "the writing indicates that the making of a false statement is punishable by criminal penalties." D.C. Code Ann. § 22-2514(a) (1996 & Supp. 2000). This is analogous to the prohibition against making false statements to the Government of the United States set forth in 18 U.S.C. § 1001 (1994).

federal mail fraud because the unissued license is the issuing authority's property. Thus, for example, in *United States* v. *Martinez*, 905 F.2d 709 (3rd Cir. 1990), the Government successfully prosecuted as federal mail fraud a scheme for obtaining a Pennsylvania state *medical* license that included submitting fraudulent documents (*e.g.*, transcripts, a medical degree, etc.) through the mails. See *id.* at 710-11 (describing the scheme). This construction of the mail fraud statute is fundamentally flawed, however, because an unissued standard business license is not an issuing authority's "property" within the meaning of the statute – a conclusion compelled by the very nature of standard business licensing regimes and this Court's cases upholding such regimes as proper exercises of the police power.

1. To be sure, governments both own property and routinely exercise the power to dispose of that property. The United States, for example, once owned large tracts of land in what are now the Western States and, in order to promote the growth of the railroads, granted that land to railroad companies for them to develop. See, *e.g.*, *United States* v. *Northern Pacific Ry. Co.*, 256 U.S. 51, 52-53 (1921) (discussing one such set of grants to the Northern Pacific Railway Company). Similarly, the United States regularly disburses from the Treasury funds that it owns, sending the funds to designated recipients as diverse as taxpayers who are owed an income tax refund and government contractors who are owed for goods sold to the United States. State and local governments likewise own land and improvements (*e.g.*, school grounds and buildings) and hold and disburse general revenue funds. When governments engage in commercial or proprietary

activities, they exercise the powers of a property owner and are in many respects indistinguishable from other property owners.

Governments also exercise a different power that many other property owners lack – namely, the power to regulate conduct in the interests of public safety and welfare, or the "police power." "[T]he police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." *Chicago, Burlington & Quincy Ry. Co.* v. *Illinois ex rel. Grimwood*, 200 U.S. 561, 591 (1906). Indeed, "the police power is but another name for the power of government." *Mutual Loan Co.* v. *Martell*, 222 U.S. 225, 233 (1911).

When a government issues standard business licenses pursuant to its own licensing regime, it clearly exercises its police power, not the powers it has by virtue of owning property. This fact is evident when one considers that a licensing regime, no less than a correspondingly framed general prohibition, serves directly to limit and regulate private conduct. For example, a municipality could decide to regulate the provision of taxi services by making it a crime to drive a taxi without a specified level of knowledge about the streets in the municipality.[8] The regulation would be enforced by prosecuting taxi drivers who were stopped because they

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[8] A legislature could accomplish equally its regulatory goals through a general prohibition (*e.g.*, "you shall not practice accountancy without adequate skill") or through a licensing regime (*e.g.*, "you shall not practice accountancy without a license, which requires adequate skill"). No one would claim

appeared to be lost, or who were reported by passengers to lack the requisite knowledge. Alternatively, the municipality could decide to achieve the same regulatory objective (*i.e.*, limiting taxi drivers to those who are knowledgeable about local streets) by requiring would-be drivers to obtain a taxi driver's license that is conditioned on the successful completion of a local geography test. See *Toulabi* v. *United States*, 875 F.2d 122, 123 (7th Cir. 1989) ("To be a taxi driver in Chicago, a person must pay a fee of $50 and answer correctly 20 out of 25 questions on a test of local geography.").

In this hypothetical, the licensing method may be more effective at producing knowledgeable taxi drivers than the prohibition method. The crucial point here, however, is that in *both* methods the municipality acts as a regulator, not an owner disposing of his or her property. See *id.* at 125 (holding that an unissued taxi driver's license is not property for purposes of the federal mail fraud statute); see also *United States* v. *Schwartz*, 924 F.2d 410, 417 (2d Cir. 1991) ("The government's interest in issuing its licenses ancillary to its regulatory program is no different than its interest in propounding and enforcing its other regulations with broad based applications

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that a general prohibition is a form of government property. *Cf.* Guido Calabresi, *The Cost of Accidents* 113-14 (1970) ("[P]rohibition and restriction . . . are really the same thing on different levels of generality. I speak of prohibiting an activity (banning the sale of firecrackers or all driving), or alternatively of restricting it (allowing firecrackers only in limited circumstances or barring driving at speeds of over 80 miles per hour). When we restrict an activity, we are simply prohibiting one of its subcategories.").

that do not include the issuance of licenses. Whether it chooses to use licenses or blanket rules, the government's purpose is to control the private use of private property.").

2. This Court has repeatedly held, in cases sustaining state and local licensing regimes against various constitutional attacks, that the creation of a licensing regime is an exercise of the police power. These cases thus confirm that the decision whether to issue a particular license to a given applicant is a regulatory and administrative act, not a disposition of property.

The earliest of these decisions, *Smith* v. *Alabama*, 124 U.S. 465 (1888), involved a Commerce Clause challenge to a then-new Alabama train engineer licensing law. The statute made it "unlawful for the engineer of any railroad train in [Alabama] to drive or operate or engineer any train of cars . . . without first undergoing an examination and obtaining a license." *Id.* at 468. Operating a train without a license was made a misdemeanor. *Id.* at 470. The license fee was $5. *Id.* at 469. Smith, an engineer arrested for operating a train without a license, *id.* at 466, attacked the statute as a violation of the Commerce Clause, *id.* at 473. This Court rejected Smith's theory, concluding that the licensing law was "within the scope of the admitted power reserved to the State to *regulate* the relative rights and duties of persons being and acting within its territorial jurisdiction." *Id.* at 482 (emphasis added).

Importantly, in turning aside Smith's challenge, the Court emphasized that the licensing law was the same

sort of state regulatory action as the Indiana state wrongful death statute it upheld against a Commerce Clause attack in *Sherlock* v. *Alling*, 93 U.S. 99, 103 (1876) (concluding that Indiana's wrongful death statute "only declares a general principle respecting the liability of all persons within the jurisdiction of the State for torts resulting in the death of parties injured"). See *Smith*, 124 U.S. at 474-77 (analogizing licensing law to wrongful death statute at issue in *Sherlock*). According to the Court, "[t]he power to punish for the offence after it is committed certainly includes the power to provide penalties directed, as are those in the statute in question, against those acts of omission which, if performed, would prevent the commission of the larger offence." *Id.* at 481. The licensing provisions were thus upheld as "parts of that body of the local law which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them." *Id.* at 480.

A year later, in *Dent* v. *West Virginia*, 129 U.S. 114 (1889), the Court rejected a Due Process challenge to West Virginia's medical licensing law. The challenged statute "require[d] every practitioner of medicine in [West Virginia] to obtain a certificate from the State Board of Health" permitting him to practice. *Id.* at 115. Practicing medicine without this certificate was made a misdemeanor. *Id.* at 117. Dent, who was fined for practicing without a license, attacked the statute as a deprivation of "his vested right in relation to the practice of medicine" without due process. *Id.* at 118, 121-22. This Court upheld the constitutionality of the medical licensing law as a

routine and valid exercise of the police power. According to the Court in *Dent*,

> [t]he power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the States as to their necessity.

Id. at 122; see also *Hawker* v. *New York*, 170 U.S. 189, 192-93 (1898) ("No precise limits have been placed upon the police power of a State, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practise medicine is a proper exercise of that power."). In *Dent*, as in *Smith*, the Court recognized that when a government issues a standard business license, it engages in a fundamentally regulatory act.

Finally, in *Gundling* v. *City of Chicago*, 177 U.S. 183 (1900), this Court upheld a conviction under a Chicago city ordinance "forbidding the sale of cigarettes by any person without a license." *Id.* Like the unlicensed doctor

in *Dent*, the unlicensed cigarette seller in *Gundling* challenged the ordinance as, among other things, an unconstitutional deprivation of his property rights without due process. *Id.* at 185-86. This Court upheld the licensing scheme for cigarette sales. According to the Court, "[w]hether dealing in and selling cigarettes is that kind of a business which ought to be licensed is, we think, considering the character of the article to be sold, a question for the state, and through it, for the city, to determine for itself." *Id.* at 187. Indeed, such a licensing scheme for regulating product sales was an unexceptional exercise of the police power:

> Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state. . . .

Id. at 188; see also *id.* at 189 (licensing cigarette sales served a "regulating . . . function").

The governmental business licensing requirements that were already "very frequent" a century ago are, today, virtually universal. And, just as they were a century ago, governmental decisions whether to issue a standard business license to a given applicant are regulatory acts, not dispositions of government property.

II. TREATING UNISSUED STANDARD BUSINESS LICENSES AS PROPERTY UNDER THE MAIL FRAUD STATUTE WOULD BRING ABOUT TROUBLING RESULTS IN OTHER AREAS OF LAW.

The question whether the United States can prosecute for federal mail fraud one who sends a falsehood through the mail to obtain a standard business license (be it local, state, or federal) might initially be viewed strictly as a matter affecting federal criminal law. But the effects of answering that question affirmatively – *i.e.*, by ruling that unissued licenses are government property – could extend far beyond the confines of the criminal law. Three illustrations drawn from diverse areas of law – one involving this Court's Takings Clause jurisprudence, the others involving powerful civil remedies – will suffice to demonstrate the havoc that could well result from concluding that unissued licenses are the government's property.

1. Treating an as-yet-unissued license as if it were the issuing authority's property would draw key features of this Court's regulatory takings jurisprudence into serious doubt. To see that this is so, one need only consider the Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), from the state permitting authority's new vantage as the property owner of the unissued real estate development permit.

In both *Nollan* and *Dolan*, the government authority that was charged with issuing the relevant real estate development permit had decided to condition the grant

of the permit on the would-be permittee's agreement to an easement. See *Nollan*, 483 U.S. at 828 (permit would be granted "subject to the condition that they allow the public an easement to pass across a portion of their property"); *Dolan*, 512 U.S. at 380 ("the Commission required that petitioner dedicate . . . an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway"). In both cases, this Court concluded that the government, by extracting these easements, had taken the permittee's property. See *Nollan*, 483 U.S. at 841-42; *Dolan*, 512 U.S. at 396. This conclusion cannot be squared, however, with the Government's current position that unissued permits and licenses are government property.

According to the Government's approach, the unissued permits at issue in *Nollan* and *Dolan* would be the property of the governmental authorities that had the power to issue them. If unissued permits or licenses are the government's property, however, it should be able to charge the would-be permittees whatever price it deems fit under the circumstances – including the price of granting the general public an easement over private realty. Indeed, the power to name one's selling price – any selling price at all – is the very essence of a *property* interest: "An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon *by the seller*." Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1092 (1972) (emphasis added). In more traditional

parlance, the power to set one's selling price is one aspect of the owner's right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). Under the Government's reasoning in this case, the permitting authorities in *Nollan* and *Dolan* did not *take* anything; rather, they simply priced the unissued permits that they owned at a level which included the surrender of a public easement.

In short, the Government's approach means that *Nollan* and *Dolan* were wrongly decided. Indeed, if one adopts the Government's conclusion that an unissued permit or license is the issuing authority's property, the government's refusal to issue a permit or license would always be an exercise of its right to refuse to transfer ownership of its own property and thus could never be a taking.

2. Treating an as-yet unissued license as if it were the issuing authority's property would also nullify existing locally-crafted, specifically-limited remedies (such as those discussed in connection with the District of Columbia's General License Law, *supra* at 7-8), in favor of not only much harsher federal criminal penalties,[9] but also in

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[9] This Court has, of course, "cautioned . . . that 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Jones* v. *United States*, 68 U.S.L.W. 4422, 4425 (U.S. May 22, 2000) (quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971)), *see also id.* (Stevens & Thomas, JJ., concurring) (same). The mail fraud statute contains no such clear statement of purpose to up-end the existing federal-state balance regarding local prosecution for violations of local standard business licensing regimes.

favor of broad federal and state civil anti-racketeering and *qui tam* remedies designed for problems far removed from arguable misstatements in applications for standard business licenses. Congress surely did not intend to expose business license applicants to these types of civil lawsuits.

Consider, first, RICO. The federal RICO statutes criminalize, among other things, engaging in "a pattern of racketeering activity." 18 U.S.C. § 1962(c) (1994). The RICO regime also provides private parties a cause of action against racketeers: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit." 18 U.S.C. § 1964(c) (1994). A " 'pattern of racketeering activity' requires at least two acts of racketeering activity," and an act of federal mail fraud is within the definition of "racketeering activity." 18 U.S.C. § 1961(1) & (5) (1994). As a result, a party who is injured in his business or property by another party's two acts of mail fraud could seek to sue in federal court for treble damages. Assuming, for example, that obtaining two renewals of a standard business license by submitting false information through the mails constitutes federal mail fraud, that licensee is thus also liable under federal RICO to those he injures in their business or property. Many states have their own parallel RICO laws.

The foregoing scenario is not mere sport. In *Semiconductor Energy Laboratory Co.* v. *Samsung Electronics Co.*, 204 F.3d 1368 (Fed. Cir. 2000), decided just three months ago, the United States Court of Appeals for the Federal Circuit

confronted just such a claim for RICO liability. In *Samsung*, the accused infringer successfully defended against patent infringement liability by proving that the patent was unenforceable due to the patentee's inequitable conduct before the United States Patent & Trademark Office ("PTO") during the patent prosecution process. *Id.* at 1373-78 (affirming district court's conclusion that patent was unenforceable due to inequitable conduct). The accused infringer had also, however, brought counterclaims under the federal and state RICO statutes. *Id.* at 1378. The accused infringer's theory of RICO liability was that the patentee had committed two or more acts of mail fraud, and thus racketeering activity, by submitting false information *to the PTO* through the mails. *Id.* at 1379. The unissued patent was, according to the accused infringer, property for purposes of the mail fraud statute. *Id.* at 1380. The Federal Circuit rejected the federal and state RICO claims, concluding "that inequitable conduct before the PTO cannot qualify as an act of mail fraud or wire fraud for purposes of the predicate act requirement." *Id.* Central to this conclusion was the Federal Circuit's rejection of the notion that an unissued patent is property:

> [T]he PTO has not been defrauded of property. Although that 'a patent is property, protected against appropriation both by individuals and by government, has long been settled,' an application that has not yet matured into a patent cannot properly be deemed government property.

Id. (quoting *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 415 (1945)). Of course, under the Government's theory of the mail fraud statute in this case, *Samsung* was

apparently wrongly decided, and RICO liability for inequitable conduct before the PTO should obtain.

Consider, as well, *qui tam* suits under the False Claims Act, 31 U.S.C. §§ 3729-3733 (1994), and state analogs thereof.[10] In a *qui tam* suit, a private party brings an action on behalf of the government to redress an injury to the government, *e.g.*, a fraudulent claim for government property. See generally John T. Boese, *Civil False Claims and* Qui Tam *Actions* § 1.01[A], 1-6 – 1-11 (2d ed. 2000) (reviewing early history of federal *qui tam* statute). Specifically, under the False Claims Act, one who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim" is "liable to the United States Government for a civil penalty," as well as "3 times the amount of damages which the Government sustains because of the" false claim.[11] 31 U.S.C. § 3729(a) (1994). A "claim" is defined broadly under this statute as "includ[ing] any request or demand, whether under a contract or otherwise, for money or *property*," so long as "the United States Government provides any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c) (1994).

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[10] A number of States have False Claims Act-like statutes that create *qui tam* causes of action. *See, e.g.*, John T. Boese, *Civil False Claims and* Qui Tam *Actions* § 6.01[A], [B] & [D], at 6-4 – 6-14, 6-25 – 6-26 (2d ed. 2000) (reviewing details of California, Florida, and Illinois analogs to the False Claims Act).

[11] In addition to seeking penalties (and damages, if they exist), a clever plaintiff might also try to concoct a common law claim for restitution of alleged ill-gotten gains, *e.g.*, all profits earned by a business with a wrongly obtained license or permit.

Given the expansive definition of a "claim" in the False Claims Act, a falsified application for a standard business license from the United States could – if that unissued standard business license constitutes government property – give rise to False Claims Act liability. Moreover, under the *qui tam* provision in the False Claims Act, "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government." 31 U.S.C. § 3730(b)(1) (1994). Such private party suits are made attractive by the False Claims Act's bounty provisions, according to which the private party who initiates the suit receives anywhere from 10% to 30% of the proceeds of the action, as well as expenses, fees, and costs. 31 U.S.C. § 3730(d) (1994). Federal and state *qui tam* statutes, no less so than federal and state RICO statutes, would no doubt become powerful weapons of civil liability should unissued standard business licenses come to be viewed as the issuing authority's property.

The point is that Congress surely did not intend to launch the mail fraud, wire fraud, RICO, and *qui tam* statutes as weapons to be used in disputes about the issuance of standard business licenses. Nor is it any answer to say that only those who deliberately falsify license applications need fear such an expansion of liability. Even honest parties who apply for standard business licenses will be faced with, at a minimum, the costs of defending nuisance suits brought by private plaintiffs clever enough to frame RICO and *qui tam* complaints that, although meritless, can withstand a motion to dismiss and serve as a basis for burdensome discovery. The fact that the Government's treating unissued business licenses as government property for purposes of the federal mail

fraud statute entails exposing licensees to massive RICO and *qui tam* lawsuits demonstrates the absurdity of such a construction of the mail fraud statute.

CONCLUSION

For the foregoing reasons, in deciding this case the Court should make clear that an unissued standard business license does not constitute government property for purposes of the federal mail fraud statute, or expressly refrain from addressing that question.

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IN THE
Supreme Court of the United States

CARL W. CLEVELAND
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are construed and applied in accordance with the United States Constitution. One of its particular concerns is ensuring that all individuals, including the criminal accused, not be subjected to prosecutorial overreaching. Thus, members of the NACDL have an interest in assuring that 18 U.S.C. § 1341, the mail fraud statute, is construed, in accordance with a majority of the courts, to curb prosecutors from bringing charges under this statute when the element of "money or property" is not premised upon an actual property interest.

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel contributed money or services to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The mail fraud statute, 18 U.S.C. § 1341 requires either a scheme to deprive of "money or property" or a deprivation of the "right to honest services." There is no allegation of a deprivation of the "right to honest services" in this case, and the alleged deprivation of "money or property" is premised upon an alleged false statement or omission in an application for a state video poker license. *See United States v. Cleveland,* 951 F.Supp. 1249, 1259n.6 (E.D. La. 1997)

The majority of circuit courts have held that an unissued state license is not "property" for the purposes of the mail fraud statute. This position should be accepted by this Court in that a state license, such as a video poker license, is merely a state acting in a regulatory manner. Further, an unissued state license does not create a property interest in the licensor, the State of Louisiana. Thus, there can be no scheme to defraud the State or its citizenry of "money or property."

To permit an unissued state license to be "property" for purposes of the mail fraud statute enlarges an already generic statute far beyond its original intent. There is no indication in the legislative history that Congress intended to monitor state activity in adopting the mail fraud statute. Further, the ramifications of allowing mail fraud to be used when there is an allegation of a misstatement in an application for a state license would permit federal prosecutors to use their prosecutorial discretion to make state licenses and permits subject to federal scrutiny. Permitting federal prosecutors to act as legislators when alleged state criminality is at issue will alter the appropriate balance between the state and federal government.

ARGUMENT

A. UNISSUED STATE LICENSES ARE NOT "PROPERTY" FOR PURPOSES OF 18 U.S.C. § 1341, THE MAIL FRAUD STATUTE

Absent an allegation that the prosecution is premised upon an "intangible right of honest services," a "scheme to defraud" of "money or property," is an essential element of 18 U.S.C. § 1341, the mail fraud statute. The mail fraud statute, enacted in 1872, was one section in a recodification of the Postal Act. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283 (codified at 18 U.S.C. § 1341). The term "money or property" was specifically affixed within the statute as a result of a 1909 amendment that added the language, "or for obtaining money or property by means of false or fraudulent pretenses, representations or promises." Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. "[T]he original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." *McNally v. United States*, 483 U.S. 350, 356 (1987).

This Court, in *McNally v. United States,* 483 U.S. 350 (1987) confirmed the necessity for a mail fraud charge to be premised upon a deprivation of "money or property." *Id.* at 356. Although this Court has accepted intangible property as satisfying the "money or property" element of the mail fraud statute,[2] it has never included state government regulatory

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[2] *See Carpenter v. United States*, 484 U.S. 19 (1987). In *Carpenter* this Court found that "[c]onfidential business information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect

actions as property for the purposes of mail fraud.

Not surprisingly, the majority of circuit courts considering the question of whether a license constitutes property have found that a license is not property for purposes of the mail fraud statute. For example, the Second Circuit in *United States v. Schwartz*, 924 F.2d 410 (2nd Cir. 1991), held that export licenses were not property for purposes of a federal fraud statute. The Sixth Circuit in *United States v. Murphy*, 836 F.2d 248 (6th Cir. 1988) found that bingo licenses were not property for purposes of the mail fraud statute. The Seventh Circuit in *Toubali v. United States*, 875 F.2d 122 (7th Cir. 1989), refused to find a taxi license to be property under the mail fraud statute. The Eighth Circuit in *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990), found that there was no deprivation of property for purposes of mail fraud when the government alleged a falsification of an application for a school bus operator's license. The Ninth Circuit in *United States v. Kato*, 878 F.2d 267 (9th Cir. 1989), refused to find property for purposes of the mail fraud statute in a case involving pilot licences. The Eleventh Circuit in *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998) held that a state bail bond license was not property for purposes of the mail fraud statute. Additional cases within these circuits also support the majority position of unissued licenses not being property for purposes of the mail fraud statute. *See, e.g., United States v. Vollmer & Company, Inc.*, 1 F.3d 1511 (7th Cir. 1993).

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through the injunctive process or other appropriate remedy." *Id.* at 26. (*citing* 3 W. Fletcher, Cyclopedia of Law of Private Corporations § 857.1, p. 260 (rev. ed. 1986)). Additionally, a 1988 amendment permits mail fraud to be premised upon "a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, P.L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (1994)).

This Court should reject the few decisions opposite the majority[3] in that an unissued state license is merely regulatory in nature and not property. As stated by the court in *United States v. Schwartz*, 924 F.2d 410 (2nd Cir. 1991), "the government's power to regulate does not *a fortiori* endow it with a property interest in the license; that is, the mere issuance of a document designed to formalize the government's regulation does not thereby create a property interest for the government." *Id.* at 417.[4]

Licenses, may in some instances create property interests in the licensee. *See Bell v. Burson*, 402 U.S. 535 (1971) (due process required prior to revocation of a driver's license). The property interest of a licensee, however, is not equivalent to the regulatory interest of the entity issuing the license, the licensor. Thus, even if one were to find that the licensee had a property right in the license, this would be irrelevant since the "scheme or artifice to defraud" is allegedly being perpetrated against the licensor (State of Louisiana). The deprivation, thus, needs to be of "property" of the licensor.[5]

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[3] *See, e.g., United States v. Salvatore,* 110 F.3d 1131 (5th Cir. 1997); *United States v. Bucuvalas*, 970 F.2d 937 (1st Cir. 1992); *United States v. Martinez*, 905 F.2d 709 (3rd Cir. 1990).

[4] The *Schwartz* decision references *United States v. Evans*, 844 F.2d 36, 42 (2nd Cir. 1988) which held that, "[b]ecause of the substantial differences between international arms sales and common-law property transactions, we conclude that the United States's interest in regulating foreign resales of arms is not a property right for wire and mail fraud purposes."

[5] Sentencing Guideline 2F1.1 emphasizes a deprivation of "money or property" in providing punishment that is determined in part by the amount of loss suffered by the victim. U.S.S.G. 2F1.1.

When a license has not been issued, it is even more definitive that there is no property for purposes of the mail fraud statute. Any possible property interest that might be alleged to exist would only accrue after the license is issued. An unissued license is nothing more than a possibility. Therefore, it cannot be claimed that one of the parties who might be the recipient of the license has deprived the licensor of property. A mere possibility is not tangible or intangible property.

B. EXTENDING THE "PROPERTY" ELEMENT OF 18 U.S.C. § 1341 TO INCLUDE STATE UNISSUED LICENSES WOULD PERMIT PROSECUTORIAL DISCRETION TO REPLACE LEGISLATIVE ACTION, AND WOULD DISRUPT THE APPROPRIATE BALANCE BETWEEN STATE AND FEDERAL GOVERNMENT

The mail fraud statute provides no indication that Congress intended to include unissued licenses as "property." Allowing prosecutorial discretion to determine whether a state or local regulatory action should be used as "property" for the purposes of the mail fraud statute, would result in executive branch officials, namely federal prosecutors, acting in a legislative capacity. If federal prosecutors are given the discretion to charge mail fraud whenever there is an allegation of a misstatement in a state or local license application that is incident to a mailing, the appropriate balance between the state and federal government would be seriously altered. As previously stated by this Court, "'[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'" *Printz v. United States*,

521 U.S. 898, 921 (1997) (*quoting Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Absent statutory language or legislative history, a broad reading of a federal statute to "transform relatively minor state offenses into federal felonies," is unwarranted. *Rewis v. United States*, 401 U.S. 808, 812 (1971). In *United States v. Bass*, 404 U.S. 336 (1971), this Court stated:

> we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Id. at 349.

Congress can encompass state law within a federal statute when it is explicitly considers the state application. For example, Congress included within the Racketeer Influenced and Corrupt Organization Act (18 U.S.C. § 1961 et.seq.) (RICO) a specific list of state activities that can form predicate acts for purposes of the federal statute.[6] Congress, also

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[6] State acts that can be "racketeering activity" for purposes of RICO are limited to "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; ...". 18 U.S.C. § 1961 (1)(A).

provided in the RICO statute the number of state acts required for a federal prosecution.[7]

One does not find similar language in the mail fraud statute or in the sparse legislative history that was aimed at the protection of the "post-office establishment of the United States."[8] Permitting unissued state licenses to serve as "property" for purposes of mail fraud would expand the statute well beyond its intended purpose.

Congress has expressed concern regarding the expansion of the mail fraud statute.[9] The legislative history of the bank fraud statute (18 U.S.C. § 1344), a statute that also contains the "scheme to defraud" language found in the mail and wire fraud statutes, reflects Congressional concern with judicial interpretation that has exceeded the intent of Congress. As stated in the legislative history:

> The new section [18 U.S.C. § 1344] would prohibit devising a scheme to defraud a

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[7] A "' pattern of racketeering activity' requires at least two acts of racketeering activity....." 18 U.S.C. § 1961 (5).

[8] *See* Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1150-52 (1997).

[9] Scholars have also expressed concern with the expansion of the mail fraud statute. *See, e.g.*, John C. Coffee, Jr., *Hush!: The Criminal Status of Confidential Information After* McNally *and* Carpenter *and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121 (1988); Peter Henning, *Maybe It Should Just Be called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 26 B.C. L. REV. 435 (1995); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137 (1990).

> financial institution, or to obtain property of such an institution, and engaging in conduct in furtherance of such scheme. The section thus parallels the language of the current mail fraud and wire fraud statute ("scheme to defraud"), and is intended to incorporate case law interpretations of those sections. The Committee, however, is concerned by the history of expansive interpretations of that language by the courts. The current scope of the wire and mail fraud offenses is clearly greater than that intended by Congress. Although the Committee endorses the current interpretations of the language, it does not anticipate any further expansions. The Committee believes that while the additional activity that could thus be brought within the purview of the language might well be reprehensible, and probably should be criminal, due process and notice argue for prohibiting such conduct explicitly, rather than through court expansion of coverage.

98th Cong.2d Sess., H.R. Rep. 98-901, at 4 (1984).[10]

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[10] Congress has on occasion revised the statute. In reacting to the *McNally,* decision, Congress passed 18 U.S.C. § 1346, permitting a 'scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right to honest services." *Id.* Congress also added to the statute the language, "or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier." Violent Crime Control and Enforcement Act of 1994 § 250006. Congress has not, however, added to the statute a statement that unissued licenses can serve as property for purposes of mail fraud.

If federal prosecutors are given the discretion to use the mail fraud statute whenever there is an allegation of a misstatement in a state or local license application that is incident to a mailing, the appropriate balance between the state and federal government would be seriously altered. Allowing video poker machines within a state is a state prerogative. Some states prohibit video gambling, such as South Carolina. *See Joytime Distributors and Amusement Co., Inc. v. State*, 1999 WL 969280, (S.C. 1999) (slip opinion), *cert. denied* 120 S.Ct. 1719 (2000). Other states, such as Louisiana, permit video poker machines subject to state licensing provisions. *La. Rev. Stat. Ann.* § 27:301 et. seq. (West Supp. 2000). The terms and definitions of the licensing procedure may be explicitly set forth in the state statute. For example, in Louisiana the Video Draw Poker Device Act explicitly states that "[a]ny license issued or renewed under the provisions of this Chapter is not property or a protected interest under the constitutions of either the United States or the state of Louisiana." *Id.* at § 27:301(D).

The ramifications of allowing prosecutors the option to charge mail fraud whenever there is an alleged misstatement in an unissued license application would result in prosecutors having federal jurisdiction of what has traditionally been within the state province. The enormous number of license and permit applications that are routinely filed in state and local municipalities would allow prosecutors an unleashed power to monitor all of these state activities. Permitting a license to be property could mean that every application for a state fishing license could be the subject of federal scrutiny. The use of the mail fraud statute as the model for other fraud statutes, such as wire fraud, bank fraud, and health care fraud, could extend such a result even further.

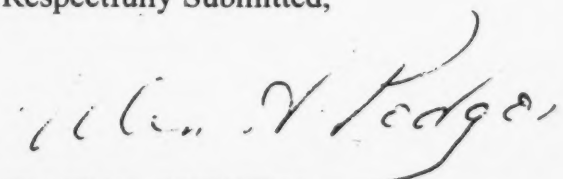
Permitting prosecutors the power to legislate in an area that has traditionally been within the purview of state and local

authority presents grave concerns to our criminal justice system. The American Bar Association, Criminal Justice Section's Task Force on Federalization of Criminal Law, chaired by Edwin Meese III, describes many of the consequences of increased federalization.[11] Providing federal prosecutors with an increased discretion in what can be charged, increases their power to act in a legislative capacity. A shift in power from the legislative branch to the executive branch, and shift in jurisdiction from state to federal, disrupts the ability of the government to run effectively.

CONCLUSION

For the foregoing reasons, NACDL urges this Court to reverse the judgment of the Court of Appeals.

Respectfully Submitted,



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[11] *See* ABA Task Force on the Federalization of Criminal Law, The Federalization of Criminal Law 26-43 (1998) (discussing the adverse impact of increased federalization on our criminal justice system).

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE SAMSUNG ELECTRONICS CO., LTD. IN SUPPORT OF THE UNITED STATES

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In the Supreme Court of the United States

No. 99-804

CARL W. CLEVELAND,
Petitioner,

v.

UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE SAMSUNG ELECTRONICS CO., LTD. IN SUPPORT OF THE UNITED STATES

INTEREST OF AMICUS CURIAE[1]

Amicus curiae, Samsung Electronics Co., Ltd., ("Samsung"), is a company involved in the manufacture of digital media, semiconductors, and information and

[1] Pursuant to Rule 37.6 of the Rules of this Court, amicus states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than amicus or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and their consent letters have been filed with the Clerk of the Court.

communications systems.[2] Samsung was a party to a patent infringement lawsuit tried before the United States District Court for the Eastern District of Virginia, which decision was appealed to the United States Court of Appeals for the Federal Circuit. The Federal Circuit decision, styled *Semiconductor Energy Laboratory Co. v. Samsung Electronics Co., Ltd., et al.*, is reported at 204 F.3d 1368. Although Samsung demonstrated that the patent was unenforceable due to inequitable conduct before the Patent and Trademark Office ("PTO"), the Federal Circuit affirmed the dismissal of Samsung's RICO counterclaims for failure of the alleged predicate act of mail fraud. 204 F.3d at 1380. The Federal Circuit concluded that Samsung's mail fraud claims (based on Semiconductor Energy Laboratory's fraudulent misrepresentations in its applications to the PTO) failed because "the PTO has not been defrauded of property." *Id.* On July 25, 2000, Samsung filed a petition for writ of certiorari presenting the question, among others, of whether a patent in the hands of the government is property under the mail fraud statute. *See* Petition for Writ of Certiorari to the Federal Circuit, *Semiconductor Energy Lab. Co. v. Samsung Electronics Co., Ltd.* (No. 00-138).[3]

The Federal Circuit's decision has been cited by the Petitioner in *Cleveland v. United States*, as being related and relevant to the question presented in *Cleveland*. Indeed,

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[2] Samsung Electronics Co., Ltd. is a publicly traded corporation organized under the laws of the Republic of Korea. It has no parent or publicly traded affiliates as those terms are commonly employed under United States law, and there is no parent or publicly held company owning 10% or more of its stock.

[3] Semiconductor Energy Laboratory Co. petitioned for writ of certiorari on the issue of inequitable conduct. *See* Petition for Writ of Certiorari, *Semiconductor Energy Lab. Co. v. Samsung Electronics Co., Ltd., et al.* (filed July 21, 2000) (00-127).

amicus Chamber of Commerce of the United States has stated that, if the Court upholds the mail fraud conviction in *Cleveland v. United States*, then "*Samsung* was apparently wrongly decided, and RICO liability for inequitable conduct before the PTO should obtain."[4]

Having petitioned for a writ of certiorari to the Federal Circuit relating to that portion of the Federal Circuit's decision that dismissed Samsung's RICO claims, Samsung now files this amicus curiae brief in support of the United States on the related question presented in this case.

One simple way for the Court to resolve the issue in this case is to hold that all unissued licenses and grants should be considered property for the purpose of the mail fraud statute. Indeed, licenses and grants are valuable rights that represent property in the hands of the grantee, and their nature should be no different in the hands of the grantor.[5] Such a rule would discourage all applicants for such grants from submitting false or fraudulent applications to the government. However, if the Court declines to adopt that clear rule, Samsung has an interest in assuring that the Court does not characterize all governmental grants alike. It is particularly important that the Court does not craft a blanket rule equating the government's interest in all types of unissued grants, which include diverse interests such as

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[4] Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Neither Party, at 21-22, *Cleveland v. United States* (filed in the Supreme Court June 1, 2000) (No. 99-804).

[5] The distinction between the character of the grant in the hands of the grantee versus the grantor is particularly irrelevant in the context of the third party pass through fraud that Samsung alleged in its case. *See* Petition for Writ of Certiorari to the Federal Circuit, *Semiconductor Energy Lab. Co. v. Samsung Electronics Co., Ltd.*, at 3, 26 (filed in the Supreme Court July 25, 2000) (No. 00-138).

permits, franchises, licenses and patents. Samsung will limit its arguments in its amicus brief to this topic.

SUMMARY OF ARGUMENT

The Court could hold that all unissued governmental grants are "property" for purposes of mail fraud. Samsung will not address in this amicus brief the argument as to why the character of a grant as property should be no different in the hands of the grantor than that of the grantee. Rather, Samsung will show in this amicus brief that, even if the Court does not so hold, it would be inappropriate to go to the other extreme and group all forms of governmental grant (licenses, franchises, patents, or permits) into a single analytical category. Governmental rights implicated by the issuance of permits can be significantly different from those arising from licenses, franchises or patents. While all licenses and grants have some incidents of property, a state's interest in a permit issued for purely regulatory purposes as a mere ministerial act (e.g., a dog license) is not the same as its interest in a license which affects public safety (e.g., a medical license), manages a finite public resource (e.g., a mineral license), delivers an income interest to the government in the proceeds of the activity conducted under the license (e.g., a video poker license), or issues after a bargained-for exchange of consideration (e.g., a patent). If the Court declines to adopt a rule that all unissued licenses and grants are property in the hands of the government, then the specific incidents of property held by the government should control the analysis of whether fraudulent acquisition of a governmental grant falls within the ambit of the mail fraud statute.

ARGUMENT

I. AT A MINIMUM, THE INCIDENTS OF PROPERTY HELD BY THE GOVERNMENT IN UNISSUED GRANTS DEPEND ON THE NATURE OF THE GRANT

The broad construction that is generally given to "property" should apply with equal force to the mail fraud statute.[6] Some courts have also rejected the artificial distinction sometimes imposed in the analysis of mail fraud claims between property fraudulently acquired versus property fraudulently taken.[7] Both of these factors militate in favor of treating all unissued governmental grants as property.

However, if the Court declines to adopt a rule that all unissued governmental grants are property for purposes of the mail fraud statute, this case alternatively presents the question of when does the government hold sufficient incidents of property in an unissued grant (e.g., a permit, license, franchise or patent) such that the fraudulent acquisition of the grant could constitute a scheme or artifice

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[6] Some circuits have acknowledged the general principal and "the common sense notion that property is anything in which one has a right that could be assigned, traded, bought, and otherwise disposed of." *United States v. Adler*, 186 F.3d 574, 576 (4th Cir. 1999) (internal quotation and citation omitted) (analogizing the mail fraud statute to the bank fraud statute, but holding alleged victim of wire fraud did not, as a creditor, have property right in any particular fund).

[7] *See, e.g.*, *United States v. Martinez*, 905 F.2d 709, 713 (3d Cir. 1990) (mail fraud "is broad enough to cover a scheme to defraud a victim of something that takes on value only in the hands of the acquirer"); *United States v. Salvatore*, 110 F.3d 1131 (5th Cir. 1997).

to defraud in violation of the mail fraud statute, 18 U.S.C. § 1341. An examination of the circuit court rulings on various licenses show a principled basis, if yet unarticulated, for distinguishing among the various types of governmental grants.

Some circuits have held that licenses are property for purposes of the mail fraud statute. *See, e.g.*, *United States v. Martinez*, 905 F.2d 709, 713 (3d Cir. 1990) (medical licenses), *United States v. Salvatore*, 110 F.3d 1131, 1143 (5th Cir. 1997) (video poker licenses); *United States v. Bucuvalas*, 970 F.2d 937, 945 (1st Cir. 1992) (liquor licenses).

Other circuits have seemingly reached the opposite result. *See, e.g.*, *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989) (taxicab licenses); *United States v. Murphy*, 836 F.2d 248, 253-54 (6th Cir. 1988) (charitable bingo permit); *United States v. Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988) (gambling licenses); *United States v. Shotts*, 145 F.3d 1289, 1296 (11th Cir. 1998) (bail bond license), *cert. denied*, 525 U.S. 1177 (1999); *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (school bus operator's permit); *Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1137 (4th Cir. 1993) (FDA approval); *United States v. Schwartz*, 924 F.2d 410, 417 (2d Cir. 1991) (export licenses).

Those circuits holding that fraudulent acquisition of a governmental grant does not fall within the mail fraud statute characterize the government's interest in a grant as merely regulatory. These courts reason that the "right to control" exercised by the government over issuance is insufficient by itself to justify the conclusion that a government has a property interest in the grant of which it can be defrauded. *See, e.g.*, *Shotts*, 145 F.3d at 1295 (rejecting argument that municipality control over issuance of bail bond license was

property right); *but see Salvatore*, 110 F.3d at 1140 ("the right to control is included in the bundle of rights known as 'property'"); and *Bucuvalas*, 970 F.2d at 945 (when city retains a right to control alienation, it holds a property right).

But it is clear that the right to control or regulate is only the minimum interest a government has in the grant of a permit or license. The right to control is by no means the maximum interest, the only incident of property that can be associated with governmental grants. If the Court declines to hold that all grants are property in the hands of the government, then in order to determine whether any particular governmental grant is property prior to its issuance, it is necessary to review the other incidents of property held by the government. Indeed, a number of different factors have been held to implicate property rights in the government prior to the issuance of a governmental grant.

A. An Income Interest/Proprietary Interest In The Activity Conducted Under The Grant Establishes A Property Interest In The Grant

Even circuits which have concluded that a simple permit is not property prior to its issuance, have reached the opposite result when more than just the right to regulate is at stake. In *Borre v. United States*, 940 F.2d 215, 219-220 (7th Cir. 1991), the Seventh Circuit upheld a mail fraud conviction based on the fraudulent acquisition of a municipal cable franchise. The court distinguished a franchise from a mere regulatory license in part because a franchise is a right that belongs to the government, and also because the government can expressly participate in and operate a franchise. In other words, the government has more than a

mere regulatory role in deciding to whom a franchise is issued and how it is operated.

The Fifth Circuit weighed similar factors in *United States v. Salvatore*, 110 F.3d 1131, 1141 (5th Cir. 1997), and concluded that the issuance of a video poker license cannot be equated to a mere regulatory interest because the issuance of this license "evinces the State's intent to participate in that industry." Moreover, the Fifth Circuit concluded that the state of Louisiana, which takes an income interest in the proceeds of activities conducted under the license, "has a direct and significant financial stake in its role as issuer of the licenses." *Id.* at 1142. These incidents of property – taking a proprietary role or an income interest – justify concluding these governmental grants are property within the meaning of the mail fraud statute.

B. The Work Investment In Creation Of The Right Establishes A Property Interest

Courts have also recognized that the work investment in the creation of a right can show there is a property interest within the meaning of the mail fraud statute. In *United States v. DeFries*, 43 F.3d 707, 711 (D.C. Cir. 1995), the D.C. Circuit commented that when a mere regulatory interest is at stake, the issuer of a license can protect itself against the wrongful issuance by merely revoking or canceling the license. *Id.* at 710. Conversely, when substantial resources are committed to the creation of the "license," mere revocation of the license cannot undo the harm related to its fraudulent issuance.

The value of the license as property to its issuer is shown in part by the work investment dedicated to its creation. *Id.* at 711. For example, the ministerial paperwork in determining that the proper fee has been paid and the

blanks filled in on a taxi license are nowhere near the detailed examination and review associated with granting a patent.

C. The Exchange Of Bargained-For Consideration Establishes A Property Interest

One panel of the Second Circuit has commented that property rights arise in the government when a permit issues as a result of a bargained-for exchange between the applicant and the government and, although not precedential, its reasoning is persuasive. In *United States v. Novod*, 923 F.2d 970, *rev'd in part on other grounds*, 927 F.2d 726 (2d Cir. 1991), the panel recognized that property rights spring up when an applicant petitions the government for a permit:

> Without the agency's assent, the permit remains with the agency. The [application] process is tantamount to a contractual transaction where a buyer and seller agree on a mutually satisfactory exchange of consideration. . . . The bargained-for exchange, in essence, would have been permit for promise. Thus construed, the permit constitutes property within the reach of the fraud statutes.

Id. at 974.[8] Thus, the exchange of consideration – the giving up of some right in exchange for receiving the benefits of the bargain – justifies the conclusion that there is a property interest properly subject to the mail fraud statute.

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[8] Notwithstanding the reasoning set forth so persuasively by the panel in *Novod* and its disagreement with the precedent in the Second Circuit, the panel was obligated to follow the precedent of its Circuit set out in *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991), and therefore reversed the mail fraud conviction at issue. *United States v. Novod*, 923 F.2d 970, 972, *rev'd in part on other grounds*, 927 F.2d 726 (2d Cir. 1991).

II. PATENTS ARE A SPECIAL FORM OF GOVERNMENTAL GRANT AND EXEMPLIFY WHY THE 'CHARACTER' OF THE GRANT IS KEY TO DETERMINING ITS PROPERTY INTERESTS

Notwithstanding the foregoing, Petitioner in this case would have the Court rule that licenses are never property for purposes of mail fraud.[1] In support of that proposition, the Petitioner has drawn on the Federal Circuit's opinion in *Samsung* for support, noting that the Federal Circuit "held that governmental actions similar to the issuance of a license do not affect the government's interests as a property holder." Pet. Br. at 10 (citing *Semiconductor Energy Lab. Co. v. Samsung Electronics Co.*, 204 F.3d 1368, 1380 (Fed. Cir. 2000)).

Petitioner acknowledges, however, that *Samsung* did not "deal[] with licenses per se." Pet. Br. at 21. Indeed, it is this acknowledged difference in the character of governmental grants that militates in favor of treating each grant individually on its own merits. As the following discussion will show, patents are a special form of governmental grant and exemplify why the 'character' of the grant must be examined.

While all grants involve some property rights, a patent unquestionably embodies valuable, transferable property rights enforceable even against the government. *Hartford-Empire Co. v. United States*, 323 U.S. 386, 415 (1945) ("That a patent is property, protected against appropriation both by individuals and by government, has long been settled."). The nature of those rights is unique. Unlike an ordinary license (which can reflect mere leave to do some thing the licensor could prevent), a patent is a grant from the

government, conveying and securing to an inventor an exclusive right. 35 U.S.C. § 154.

In order to receive the benefit of that exclusive right, an inventor must make a choice between holding his invention as a trade secret, or revealing it to the world through a patent. "Once an inventor has decided to lift the veil of secrecy from his work, he must choose the protection of a federal patent or the dedication of his idea to the public at large." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 149 (1989). If the inventor chooses to seek the protection of the federal patent system, he enters into a "carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice the invention for a period of years." *Id.* at 150-51.

The patent application process is thus a bargained-for exchange in which consideration flows in both directions. Indeed, in order to issue a patent, "the public has paid the congressionally mandated price for [the future] disclosure." *Id.* at 152; *cf.*, *United States v. Novod*, 923 F.2d 970, 974 *rev'd in part on other grounds*, 927 F.2d 726 (2d Cir. 1991) ("The bargained-for exchange, in essence, would have been permit for promise. Thus construed, the permit constitutes property within the reach of the fraud statutes.").

There are other unique aspects to the patent context. The grant received by the issuance of a patent is much more than a license to practice, or even a recognition of the inventor's novel contribution to the progress of the useful arts. *See* U.S. CONST. art. I, § 8. Rather it is the right to exclude others from making, using, or selling the claimed invention. The government's promise on issuance of a patent is not just a "promise not to interfere," it is a promise to aid in the enforcement of the right of the patentee – including

against the government itself – with respect to practicing the claimed invention.

In dissenting, in part, in *Borre v. United States*, 940 F.2d 215, 220 (7th Cir. 1991), to the proposition that franchises could not be equated to licenses, Judge Easterbrook noted that "licenses improperly issued do not diminish any of the government's interests except that in the accurate enforcement of the law." *Id.* at 225 (Easterbrook, J., concurring in part and dissenting in part). If Judge Easterbrook's test were the litmus, whether the government has a diminished interest as a result of the fraud that induces the issuance of a governmental grant, then certainly the fraud that causes the PTO to issue an unwarranted patent passes that test. By approving the issuance of a patent, the government affirmatively chooses to subject itself to suit so that the benefits of the invention can be revealed to the public. The government's rights are clearly diminished.

Moreover, the government's process for issuing a patent requires far more than a mere ministerial effort. Enormous resources are dedicated to ascertaining the validity of an application. This expenditure of time, effort and expense, is an additional reason to recognize the government's property interest in a patent. *Cf. United States v. DeFries*, 43 F.3d 707, 711 (D.C. Cir. 1995). The "price" the government pays for entering into the patent bargain is significant. Not only does the government invest time and resources in examining the application, it grants a right of exclusion, and waives its sovereign immunity from suit for infringement in exchange for the ultimate release of the patented information. *See* 28 U.S.C. § 1498. The government's interest when issuing a patent is thus far more than regulatory. It is proprietary. It results from an exchange of consideration between the government and the patentee. If the federal government is fraudulently induced to enter into

and complete the terms of its bargain, it has been defrauded of property for purposes of the mail fraud statute.

CONCLUSION

Holding that all licenses and grants are property in the hands of both the government as well as the grantee, would make for a logical, uniform rule that encourages lawful conduct and the equal administration of justice. At a minimum, however, the property rights held by a government prior to issuance of governmental grants represent a continuum, ranging from mere regulatory interests to highly proprietary interests (video poker licenses) and interests which arise as a result of bargained-for exchange of consideration (patents). When heightened property interests are invoked, they clearly satisfy the purposes of and, hence, should be subject to the mail fraud statute. Samsung urges the Court to hold that governmental grants are "property" for purposes of mail fraud. However, should the Court decline to adopt such a rule, Samsung urges the Court to instruct that the character of a governmental grant must control whether fraudulently inducing its issuance can fall within conduct proscribed by the mail fraud statute.

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